Supreme Court, U. S.
FILED
JUL 14 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-46

THE AMERICAN TOBACCO COMPANY,
Petitioner,

v.

JOHN PATTERSON, *et al.*,
Respondents.

AMERICAN BRANDS, INC.,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MAYS, VALENTINE,
DAVENPORT & MOORE
F & M Center
Post Office Box 1122
Richmond, Virginia 23208

HENRY T. WICKHAM
JOHN F. KAY, JR.
F & M Center
Post Office Box 1122
Richmond, Virginia 23208

CHADBOURNE, PARKE,
WHITESIDE & WOLFF
30 Rockefeller Plaza
New York, New York 10020
Of Counsel

PAUL G. PENNOYER, JR.
BERNARD W. MCCARTHY
30 Rockefeller Plaza
New York, New York 10020
Counsel for Petitioners

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	3
Statement of the Case	3
Reasons for Granting the Writ	8
I—The Decision of the Court of Appeals Imposes a "Result-oriented" Standard Under Title VII In Direct Conflict with the "Process-oriented" Standard Adopted by this Court In *Griggs* v. *Duke Power Co.*	8
II—The Award of "Front Pay" Is In Direct Conflict with Decisions of the Fifth and Sixth Circuits and the Universally Adopted "Rightful Place" Interpretation of Title VII	12
III—The Court of Appeals Erroneously Interpreted the "Different Locations" Language of Section 703(h)	16
IV—In Permitting the EEOC to Maintain Suit Without Giving American Adequate Notice of the Allegations Against It, the Court of Appeals Has Rendered Meaningless the Procedural Safeguards of Title VII and the EEOC's Regulations	18
Conclusion	22

Authorities Cited

Cases: PAGE

Accardi v. *Shaughnessy*, 347 U.S. 260 (1954) 18, 21

Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975) ..13, 15

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) 9, 21

Bush v. *Lone Star Steel Co.*, 373 F. Supp. 526 (E.D. Tex. 1974) 13

EEOC v. *General Electric Co.*, 532 F. 2d 359 (4th Cir. 1976) 20, 21

EEOC v. *Hickey-Mitchell Co.*, 507 F. 2d 944 (8th Cir. 1974) 18, 19, 20, 21

Franks v. *Bowman Transp. Co.*, 96 S.Ct. 1251 (1976) 14

Franks v. *Bowman Transp. Co.*, 495 F.2d 398 (5th Cir. 1974), *rev'd on other grounds*, 96 S. Ct. 1251 (1976) 15

Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) ..8, 9, 10, 12

Harper v. *Mayor and City Council of Baltimore*, 359 F. Supp. 1187 (D. Md.), *aff'd sub nom. Harper* v. *Kloster*, 486 F.2d 1134 (4th Cir. 1973) 11

Head v. *Timken Roller Bearing Co.*, 486 F.2d 870 (6th Cir. 1973) 12, 15

Johnson v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974) 12

Local 189, United Papermakers and Paperworkers, AFL-CIO v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970) 13, 14

McDonald v. *Santa Fe Trail Transp. Co.*, —— U.S. —— (1976) 10

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) 9

PAGE

Meadows v. *Ford Motor Co.*, 510 F.2d 939 (6th Cir. 1975) 12, 15

Pasadena City Bd. of Education v. *Spangler*, —— U.S. —— (1976) 11

Pettway v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974) 12, 13, 14

Russell v. *American Tobacco Co.*, 528 F. 2d 357 (4th Cir. 1975), *cert. denied*, —— U.S. —— (1976) .. 16

Sabala v. *Western Gillette, Inc.*, 516 F.2d 1251 (5th Cir. 1975) 12, 13

Satty v. *Nashville Gas Co.*, 522 F.2d 850 (6th Cir. 1975) 12

United States v. *Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973) 14

United States v. *United States Steel Corp.*, 371 F. Supp. 1045 (N.D. Ala. 1973), *rev'd on other grounds*, 520 F.2d 1043 (5th Cir. 1975) 13

Vitarelli v. *Seaton*, 359 U.S. 535 (1959) 18

Yellin v. *United States*, 374 U.S. 109 (1963) 18, 21

Statutes:

Civil Rights Act of 1866, 42 U.S.C. § 1981 (1970) 3

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1970), *as amended*, (Supp. III, 1973) .....*passim*

Title VII of the Civil Rights Act of 1964:

§ 703(a) 3, 5

§ 703(h) 3, 16, 17

§ 703(j) 3

PAGE

§ 706(b) 3,19, 20
§ 706(g) 3

42 U.S.C. § 2000e-5(d) (1970), *as amended,* 42 U.S.C. 2000e-5(e) (Supp. III, 1973) 5, 8

42 U.S.C. § 2000e-5(f)(1) (Supp. III, 1973) 6

29 C.F.R. § 1601.1 *et seq.* 3, 19

29 C.F.R. § 1601.10 (1975) 19

29 C.F.R. § 1601.11(a)(3) (1975) 19

29 C.F.R. § 1601.13 (1972) 19

29 C.F.R. § 1601.14 (1972) 19, 20

29 C.F.R. § 1601.19b(a) (1972) 20

29 C.F.R. § 1601.19c (1972) 20

29 C.F.R. § 1601.19d(a) (1972) 20

29 C.F.R. § 1601.23 (1975) 18, 20

Other Authorities:

Fiss, *The Fate of An Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade after* Brown v. Board of Education, 41 U. Chi. L. Rev. 742 (1974) 9

S. Rep. No. 92-415, 92d Cong., 1st Sess. 25 (1971) 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. .....

THE AMERICAN TOBACCO COMPANY,
Petitioner,

v.

JOHN PATTERSON, *et al.*,
Respondents.

AMERICAN BRANDS, INC.,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners, The American Tobacco Company, a division of American Brands, Inc., and American Brands, Inc. (hereinafter referred to as "American"), respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on February 23, 1976.

Opinions Below

The opinion of the court of appeals is reported at —— F.2d ——, 11 EPD ¶ 10,728 (A1a).* The order of the court of appeals denying the petition for rehearing is unreported (A36a). The first memorandum opinion of the District Court for the Eastern District of Virginia is reported at 8 EPD ¶ 9722 (A38a). The second memorandum opinion of the district court is reported at 9 EPD ¶ 9909 (A85a).

Jurisdiction

The decision of the court of appeals was entered on February 23, 1976. A timely petition for rehearing and suggesting rehearing in banc was denied by order entered April 16, 1976. This petition for a writ of certiorari was filed within 90 days of the entry of that order. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

These cases offer a unique opportunity for the Court to resolve significant issues regarding the nature of liability, the scope of the back pay remedy, the meaning of the "different locations" exception of Section 703(h) and the power of the Equal Employment Opportunity Commission ("EEOC") to maintain suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1970), *as amended,* (Supp. III, 1973) ("Title VII"):

1. Where a seniority system has operated to permit all employees to compete equally for promotions for a period well in excess of the statutory period during which a

* References to "A" are to the separate appendix submitted herewith.

charge must be filed, is it permissible to find a violation of Title VII based on statistics showing continuing disproportionate numbers of blacks and females in some job classifications and white males in others?

2. Is an award of "front pay" a permissible remedy under Title VII?

3. Does Section 703(h) of Title VII, as a matter of law, create a presumption that employees of different plants do not fall within the category of "employees who work in different locations" merely because they were hired from the same geographic labor market?

4. Can the EEOC maintain an action where, in violation of Title VII and its own regulations, it failed to give notice of the allegations underlying the action before making a determination of reasonable cause?

Statutory Provisions Involved

The pertinent sections of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1970), *as amended* (Supp. III, 1973) (Sections 703(a), 703(j), 706(g), 703(h) and 706(b)) and the EEOC's Regulations (29 C.F.R. § 1601.1 *et seq.*) are set forth in the Appendix hereto (A113a).

Statement of the Case

These are Title VII cases, consolidated for trial and appeal, wherein the lower courts held that the seniority systems at two separate plants of American in Richmond, Virginia, were discriminatory. The *Patterson* action* was brought as a class action on behalf of black employees of American. The *EEOC* action was brought by the EEOC on behalf of both blacks and females.

* The *Patterson* action also involved the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1970).

The Virginia Branch (which manufactures cigarettes) and the Richmond Branch (which produces pipe smoking tobacco), are at different physical locations within Richmond, Virginia. The two plants have always had different plant managements, work requirements and personnel needs, and have always had separate hiring facilities and separate seniority systems. A no-transfer rule has been in effect between the plants. There have always been black, white, male and female employees at both plants.

In 1963, racially segregated unions and departmental seniority systems were abolished at both plants and thereafter jobs were awarded within each plant without regard to race. In 1966, male and female job classifications were abolished and all jobs were thereafter equally available to men and women at both plants. Thereafter, jobs were awarded within each plant solely on the basis of plant-wide seniority. The only exceptions were nine jobs out of over 200 at the Virginia Branch and one job at the Richmond Branch for which prior experience in a different job was required, and one job at the Virginia Branch for which prior experience in that job was required. In January, 1968, the latter requirement was eliminated and a posting and bidding procedure replaced the canvassing procedure theretofore used to find the most senior employee desiring to fill a vacancy. At least since January, 1968, American's promotional systems, based on plant-wide seniority, have operated so as to give all employees equal opportunity to compete for promotions.

American contended that the use of plant-wide (employment date) seniority avoided any continuing effects of past discrimination and that because no charge challenging the discarded practices was filed within the requisite period,* the actions were jurisdictionally de-

* The first charge was not filed until January 3, 1969, some 350 days after the implementation of the posting and bidding pro-

(*footnote continued on following page*)

fective and should have been dismissed. Additionally, American contended that the *EEOC* action, insofar as it related to allegations of discrimination against females, should have been dismissed because it was based on a charge filed by a male and American, which was never given notice of the allegations of discrimination against females before the EEOC made its determination of reasonable cause, had no meaningful opportunity to respond to or conciliate those allegations.

The district court found that the "system of posting and bidding adopted in 1968 is fair" (A44a), yet it held that the system needed "further implementation" (*id.*). It concluded that black and female employees had been locked into their jobs, not as a result of current employment practices, but "because of the static condition of the tobacco industry generally, and American in particular, and the advent of automation, both of which have limited opportunities for upward movement of present employees and for new hiring" (A44a-45a).* Notwithstanding that these factors were not employment practices within the meaning of Section 703(a) of Title VII, the district court, "with the full realization that statistics are often misleading" (A43a), nevertheless imposed liability based on "[t]he inference which the Court draws from the statistics overall . . . that . . . there was and is disparate income by race and sex, segregated job classifications by race and sex, and promotional systems based on race and sex" (A44a). Additionally, the district court held that the EEOC had the power to bring suit under the facts of this case, stating that

(*footnote continued from preceding page*)

cedure based on plant-wide seniority and 260 days after the expiration of the 90-day period then in effect for filing a charge (42 U.S.C. § 2000e-5(d) (1970)), which was later amended by increasing the period to 180 days (42 U.S.C. § 2000e-5(e) (Supp. III, 1973)).

* Although discrimination in hiring was an issue at trial in the *EEOC* case, the district court found that there had been no such discrimination.

where an EEOC investigation, based on a charge alleging discrimination against males, uncovers discrimination against females, "[d]iscovery of such discrimination without the ability to seek to alleviate it in accordance with 42 U.S.C. § 2000e-5(f)(1) would subvert the purpose of that provision" (A42a).

The district court ordered that incumbent employees be "bumped" from their jobs to permit black and female employees with greater seniority to occupy their positions, that the plant-wide seniority rosters be merged into a single company-wide seniority roster, and that the requirement of prior experience in another job be eliminated for six of the nine positions as to which that requirement pertained. It also ordered that back pay be awarded in amounts to be determined at a subsequent hearing.

To implement the "bumping" order, the district court entered a detailed decree (A89a) which required, *inter alia*, the posting of job descriptions for all hourly-rated jobs, a tour of each plant for each class member, a viewing of three jobs of his or her choice to which seniority alone would entitle him or her, the selection of one of those jobs, and the awarding of that job or the execution of a court approved "Waiver of Job Selection Opportunity" (A102aa). Pending appeal, the court of appeals stayed the "bumping" order, but only insofar as it required the actual "bumping" of incumbent employees. As required by the district court order, American submitted a report to the district court on the job selection procedure (hereinafter referred to as "the Report"), and filed the Report with the circuit court by a Motion to Supplement Record (A103a).

The court of appeals affirmed the finding of discrimination, although it too recognized the influence of the "static employment in the tobacco industry" (A6a). It relied primarily on statistics as of the time of trial which showed a concentration of blacks and females in some jobs and white males in others (A7a and 23a) and on the fact that

some jobs had never been held by blacks (A8a), some had never been held by females (A23a) and some had never been held by white males (A8a and 23a). Based on these statistics, it assumed without identifying any causal connection, that certain practices must have contributed to such imbalances:

> "Although the company and the union have taken steps in recent years to correct some of the inequalities of the past, the lines of progression, the lack of definite written job descriptions, and barriers to transfer between the branches remain impediments to fair and neutral employment practices. Much must still be done to eradicate any taint of racial discrimination at the plant" (A7a).

By focusing on statistics showing the "taint" of past discrimination, it failed properly to consider evidence showing substantial movement of blacks and females desiring promotions at each plant, and it failed to recognize that the "impediments" had not operated to impede advancement.*

The court of appeals, in reviewing the relief ordered by the district court, limited the provisions requiring the merger of the separate plant seniority rosters to inter-plant

---

* Between 1964 and 1974, at the Richmond Branch, where about 50% of the employees were black, 85% of all promotions were filled by blacks; of the desirable packing machine operator positions, 61% were held by blacks in 1973. At the Virginia Branch, where about 17% of the factory employees were black, there had been 363 promotions between January 15, 1968 and the time of trial in 1973, and 51% of those receiving the promotions were black. Of the successful bidders for jobs in the fabrication department at the Virginia Branch, which department had been an all-white department before the elimination of racially segregated job classifications in 1963, 39% were black, and of successful bidders for the desirable automatic machinery operator classification in the fabrication department, 20% were black. From 1964 to 1974, females, who comprise about 43% of the factory employees at the Virginia Branch, received 33% of all promotions and 73% of the promotions to operator of automatic machinery in the fabrication department.

transfers for a narrow sub-class of plaintiffs and reversed the "bumping" order. It expanded the scope of the back pay remedy to include an award for a period beyond the date of judgment to an indefinite time in the future when "the workers are promoted to the jobs their seniority and qualifications merit" (A19a). Over the dissent of Judge Widener, the circuit court affirmed the holding that the EEOC could maintain that portion of its action premised on allegations of discrimination against females, even though the charg had been filed by a male.

Reasons for Granting the Writ

I

The Decision of the Court of Appeals Imposes a "Result-oriented" Standard Under Title VII In Direct Conflict with the "Process-oriented" Standard Adopted by this Court In *Griggs* v. *Duke Power Co.*

These cases present a basic question as to the obligations Title VII imposes upon employers to undo the effects of past discrimination. Once an employer provides a seniority system under which all employees compete equally for promotions as they arise, will the employer nevertheless be liable under Title VII if there rem ns a statistically identifiable concentration of employees by race or sex in various job classifications?* This issue has been stated as follows:

> "Antidiscrimination laws are capable of two basic interpretations. One interpretation—call it process-oriented—emphasizes the purification of the decisional process. The prohibition against discrimination is interpreted as a ban against basing a decision on certain forbidden criteria, for example, an individual's race. A second interpretation—call it result-oriented—emphasizes the achievement of a certain result, improvement of the economic and social position of the protected group. For example, under the result-oriented approach, the obligation imposed by . . . a fair employment law . . . is not to refrain from taking an applicant's race into consideration but rather to eliminate Black unemployment and underemployment." Fiss, *The Fate of An Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade after* Brown v. Board of Education, 41 U. Chi. L. Rev. 742, 764 (1974).

* This assumes as is the fact here that no charge is filed within the statutory period after implementation of a non-discriminatory system. It is a jurisdictional prerequisite that a discriminatory practice must be currently in operation or have been terminated not more than 180 days before the filing of a charge with the EEOC. 42

(*footnote continued on following page*)

This Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), resolved this dispute in favor of the process-oriented approach:

> "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." (401 U.S. at 429-30).

The *Griggs* decision did not construe Title VII to require an employer to eliminate statistical imbalances which might exist in its work force. It did construe Title VII to require that employers must provide "equality of employment opportunities."

(*footnote continued from preceding page*)

U.S.C. § 2000e-5(e) (Supp. III, 1973); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798 (1973). As already noted at 4, the jurisdictionally critical time when the first charge applicable to the instant cases was filed was 90 days, and no charge was filed until almost a year after the posting and bidding system was implemented.

In premising its affirmance of the district court's finding of liability on statistics showing a concentration of blacks and females in certain job classifications and white males in others and on the fact that some jobs had never been held by blacks or females whereas other jobs had never been held by white males, the court of appeals has, in effect, held that Title VII imposes an obligation on employers to achieve racial balance.* Under the decisions below, to have avoided liability under Title VII, American would have had to have disregarded its plant-wide seniority system and reassigned white males, blacks and females to certain job categories based solely on criteria of race and sex. Such conduct would in and of itself violate Title VII and constitute the sort of color and sex-conscious employment decisions explicitly rejected by *Griggs*:

> "In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." (401 U.S. at 430-31).

This Court has recently reiterated this description of Title VII in *McDonald* v. *Sante Fe Trail Transp. Co.*, —— U.S. —— (1976).

By relying on statistical imbalances, the circuit court ignored the fact that under American's plant-wide seniority systems promotions depended entirely on what vacancies

* Respondents in the *Patterson* action read the court of appeals' decision to require just this sort of racial balancing. In their Brief In Opposition To Application for Stay before this Court, at 3, they said:

> "In this case, moreover, statistics alone would have been sufficient *to prove that petitioner had failed to disestablish its segregated departments;* whether such a segregated system has been effectively abolished must be judged by the changes in the composition of departments which have actually occurred." [Emphasis added.]

were open, the employees' motivation to bid for them and comparative seniority; factors which under any seniority system might well result in statistical balance one year and imbalance another. *Cf. Pasadena City Bd. of Education* v. *Spangler,* —— U.S. —— (1976). The circuit court assumed the existence of "impediments" to the promotion systems without in any way relating the "impediments" to the gross statistics on which it relied.* The fallacy underlying the reliance on statistics showing racial and sexual imbalances and the assumptions based thereon is demonstrated by the fact that even had the bumping procedure ordered by the district court been implemented, the statistics relied on by the court of appeals would not have changed. The Report (A103a) revealed that only 6% (40 of 651) of the class members elected to move from their current positions; only 1% (8 of 651) of the class selected jobs held by white males (the remaining class members who desired to move wanted jobs already held by class members); only 4 of 651 class members wanted to transfer between plants to jobs which would result in the displacement of white males, and only two wanted a job presently held by white males for which prior experience in a different job had been a requirement.

The inevitable result of the decision of the court of appeals is that, to comply with Title VII, employers not only must provide an equal opportunity for all employees to compete but also are required, based solely on race and sex, to redistribute employees within their work force. In

* The problem of dealing with statistics without identifying the causes of those statistics has been observed in a similar context:

> "But dramatic and frustrating though it may be, this discrepancy does not prove a violation of the Civil Rights Acts, as plaintiffs contend. It does not evidence that the defendants maintained practices or procedures which caused the statistical discrepancy. And most importantly, it gives no clue as to where the problem of disparate treatment might lie." *Harper* v. *Mayor and City Council of Baltimore,* 359 F. Supp. 1187, 1193 (D. Md.), *aff'd sub nom. Harper* v. *Kloster,* 486 F. 2d 1134 (4th Cir. 1973). [Footnote omitted.]

essence, therefore, the decision converts a statute the purpose of which is the creation of a process for equal employment opportunity into a statute mandating employment decisions based solely on considerations of race and sex. This new interpretation of Title VII is in direct conflict with this Court's decision in *Griggs*. Because of its obvious national import, the decision below should be reviewed and reversed by this Court.

II

The Award of "Front Pay" Is In Direct Conflict with Decisions of the Fifth and Sixth Circuits and the Universally Adopted "Rightful Place" Interpretation of Title VII

The Fourth Circuit, in its opinion below, ordered the payment of back pay prospectively beyond the date of judgment until some indefinite point in the future—*i.e.*, "front pay":

> ". . . back pay must be allowed an employee from the time he is unlawfully denied a promotion, subject to the applicable statute of limitations, until he actually receives it." (A 18a).

This decision is in direct conflict with decisions in the Fifth and Sixth Circuits which have held that, consistent with the "rightful place" interpretation of Title VII, back pay should terminate on or before the date of judgment. *Sabala* v. *Western Gillette, Inc.*, 516 F.2d 1251, 1265-66 (5th Cir. 1975); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 258 (5th Cir. 1974); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1379 (5th Cir. 1974); *Meadows* v. *Ford Motor Co.*, 510 F.2d 939, 948 (6th Cir. 1975); *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870, 876-78 (6th Cir. 1973). *See also Satty* v. *Nashville Gas Co.*, 522 F.2d 850, 855 (6th Cir. 1975).

In *Sabala, supra*, decided after this Court's opinion in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), plaintiffs had appealed the district court's order that back pay continue only until the date of judgment, arguing that the award should not terminate until the affected employees attained the positions which they would have had but for the employer's discriminatory practices. In rejecting plaintiffs' contention, Judge Wisdom, who had authored the landmark "rightful place" opinion of *Local 189, United Papermakers and Paperworkers, AFL-CIO* v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970), reaffirmed the Fifth Circuit's consistent position that back pay must terminate, at the latest, on the date of judgment:

> "In *Pettway*, the court ordered injunctive relief to aid the discriminatees in gaining and maintaining their rightful place. 494 F.2d 211, 248. Although we ordered the district court to require the company to take affirmative steps to insure that the discriminatees be given their rightful place, we did not require the district court to award back pay to the date they would actually take their rightful place. 'The termination date of the back pay period for most claimants will be the date of the *district court's decree implementing our decision*, but may, depending on the employee's situation, be [earlier on] March 31, 1971, the date testing was ended.' 494 F.2d 211, 258 (emphasis added)." (516 F.2d at 1266).*

---

* The two decisions relied on by the Fourth Circuit in its opinion here were opinions of *district courts* in the Fifth Circuit which are in direct conflict with the Fifth Circuit's position on back pay. *Bush* v. *Lone Star Steel Co.*, 373 F. Supp. 526 (E.D. Tex. 1974), was not appealed and hence never ruled on by the Fifth Circuit, *United States* v. *United States Steel Corp.*, 371 F. Supp. 1045 (N.D. Ala. 1973), was appealed on other issues (520 F.2d 1043 (5th Cir. 1975)) and the termination date specified in the district court's

(*footnote continued on following page*)

In *Local 189, supra,* Judge Wisdom set forth the theory of liability and relief which has been universally adopted as the proper interpretation of Title VII:

> "A *'rightful place'* theory stands between a complete purge of 'but-for' effects [and] maintenance of the status quo. The Act should be construed to prohibit the *future awarding* of vacant jobs on the basis of a seniority system that 'locks in' prior racial classification." (416 F.2d 988) [Emphasis in original.] [Footnote omitted.]

Under the "rightful place" theory, a court will enjoin those practices that have "locked in" the affected employees, thereby placing them in a position to bid on an equal basis for vacancies in higher paying jobs as they arise; however, affected employees do not get immediate promotion, but rather are given "the first opportunity to move into the next vacancies in positions which they would have occupied but for wrongful discrimination and which they are qualified to fill." *United States* v. *Georgia Power Co.,* 474 F.2d 906, 927 (5th Cir. 1973). They are slotted into the seniority system in the position they would have been absent discrimination. *Franks* v. *Bowman Transp. Co.,* 96 S. Ct. 1251, 1264-65 (1976).

In the "rightful place" cases, the date of judgment has been selected as the cut-off date for back pay awards because it is from that date that the unlawful employment

---

(footnote continued from preceding page)

opinion would appear to have been overruled by the Fifth Circuit's instructions to the district court as to the scope of the back pay remedy:

> "After consulting *Pettway, supra,* 494 F.2d at 258, with regard to Alabama limitations, the beginning date, and the *closing date of the back pay period,* the district court, with the assistance of the parties, should strive to the fullest practicable degree to award back pay by reconstructing hypothetically each eligible claimant's work history." (520 F.2d at 1055). [Emphasis added.]

practice is eliminated allowing all employees thenceforth to compete equally. The cut-off date can be even earlier where the discriminatory practice was earlier terminated by voluntary action of the employer, as in *Head* v. *Timken Roller Bearing Co., supra,* at 878. Under the "rightful place" theory, in the same manner that Title VII requires that all employees be given equality of opportunity to compete for job opportunities as they arise, but not the right to immediate placement in the job to which their seniority alone might entitle them, back pay applies only to that period during which the employees were impeded by a discriminatory practice and does not apply prospectively.

The courts adopting the "rightful place" theory and terminating back pay as of the date of judgment were well aware of the requirement, recently confirmed by this Court in *Moody, supra,* of "making persons whole for injuries suffered through past discrimination" (422 U.S. at 421):

> "The remedies authorized in Title VII specifically include back pay. As indicated above, the purpose of Title VII is to make the discriminatee whole and eliminate the effects of past discrimination as far as possible. Where the discriminatee has suffered economic injury in the form of lost wages, back pay is normally appropriate relief." *Franks* v. *Bowman Transportation Co.,* 495 F.2d 398, 421 (5th Cir. 1974), *rev'd on other grounds,* 96 S.Ct. 1251 (1976).

Accord, Meadows v. *Ford Motor Co., supra* at 948.

Given the importance of the back pay remedy under Title VII, its scope should not vary from court to court. The conflict between the Fourth Circuit and the Fifth and Sixth Circuits is now clearly defined and this critical issue ought to be resolved by this Court.

III

The Court of Appeals Erroneously Interpreted the "Different Locations" Language of Section 703(h)

In *Russell* v. *American Tobacco Co.*, 528 F. 2d 357 (4th Cir. 1975), *cert. denied*, —— U.S. —— (1976), the Fourth Circuit first set forth its "labor market" rule under which the "different locations" language of Section 703(h) of Title VII* is interpreted to create a presumption that employees drawn from the same labor market do not work at different locations. In the instant case, the court of appeals stated the rule as follows:

> ". . . the labor market is the most important factor in determining whether a company's employees work in different locations. A company operating two or more of its plants with employees who are from the same geographic area and who are unskilled or possess the same skills *can assign* an applicant to an entry level position in either plant. Therefore, employees the company hired from the same labor market would not generally fall within the statutory class of 'employees who work in different locations.'" (A12a) [Emphasis added.]

Here, in reliance on its "labor market" rule, the Fourth Circuit, without any finding that American actually assigned employees to one or the other of its plants, imposed

---

* Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) (1970), provides in pertinent part:

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment . . . to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . ."

inter-plant transfer relief as if there had been actual assignment and as if such assignment had been done with intent to discriminate.

The Fourth Circuit makes the initial presumption that employees drawn from a common labor market do not work at different locations even though they work at different plants. It further presumes that an employer *could* have assigned employees to one or the other of those plants and that therefore it *did* in fact so assign employees. Finally, based on these presumptions, it further presumes that such assignment was with an intent to discriminate.

Against the facts of this case, where each plant maintained independent hiring offices, made different products and hired at different times, where there was no evidence that blacks or females had ever been excluded from either plant or assigned to one plant or the other, and where the district court found that there had been no discrimination in hiring, it becomes clear that the Fourth Circuit has read the "different locations" exception out of Title VII. Every employer who by geographic accident operates more than one plant within a labor market will now be faced with potential liabilities of serious proportions even though the plants involved are wholly independent and manufacture different products. Section 703(h) is not intended to place such a burden on employers and on its face is intended to bring the opposite result.

Such an important question of interpretation should be reviewed and settled by this Court.

IV

In Permitting the EEOC to Maintain Suit Without Giving American Adequate Notice of the Allegations Against It, the Court of Appeals Has Rendered Meaningless the Procedural Safeguards of Title VII and the EEOC's Regulations

In permitting the EEOC to maintain suit alleging discrimination against women where no charge bearing such allegations was ever filed by or on behalf of an aggrieved employee, the Fourth Circuit permitted the EEOC to violate the procedural safeguards given to employers under Title VII and the regulations promulgated thereunder by the EEOC itself.

This Court has made it clear on numerous occasions that it will not tolerate a governmental body's failure to follow its statutory mandate and its own regulations. *See, e.g., Yellin* v. *United States,* 374 U.S. 109 (1963); *Vitarelli* v. *Seaton,* 359 U.S. 535 (1959); *Accardi* v. *Shaughnessy,* 347 U.S. 260 (1954). The proper sanction when such violations occur is the dismissal of the action. *Yellin* v. *United States, supra; EEOC* v. *Hickey-Mitchell Co.,* 507 F. 2d 944 (8th Cir. 1974). In *Yellin,* this Court, reversing a conviction for contempt of Congress because the House Committee on Un-American Activities had failed to follow its own rules, stated:

> "But [Yellin] is at least entitled to have the Committee follow its rules and give him consideration according to the standards it has adopted. . . ." (374 U.S. at 121).

The Court of Appeals for the Eighth Circuit applied this concept to the EEOC's failure to follow its own regulations and the Fourth Circuit is in direct conflict with that position. In *EEOC* v. *Hickey-Mitchell Co., supra,* the EEOC failed to comply with its regulation, 29 C.F.R. § 1601.23, requiring that it notify the employer

of the failure of conciliation attempts and the termination thereof unless the employer asked to reopen conciliation discussions. The Eighth Circuit held that the EEOC's failure to follow the conciliation procedure to its final conclusion as provided in its regulations warranted dismissal of the action, even where the employer had expressly stated that it did not want to conciliate. It reasoned:

> "Compliance with the regulation, a last gesture by the Commission of a conciliatory attitude, may well give pause to the most (theretofore) recalcitrant employer, now indubitably faced with expensive and time-consuming litigation, and thus lead to a resolution of these disputes in the congressionally preferred forum." 507 F.2d at 949.

In the instant case, the violations were more numerous and more flagrantly in disregard of procedural rights and the conciliation mandate of Title VII than was the violation in *Hickey-Mitchell.* No charge was ever filed containing allegations relating to American's employment practices with respect to females* as required by Section 706(b) and 29 C.F.R. § 1601.11(a)(3) (1975).** At no time before the determination of reasonable cause was American given any notice, as required by Section 706(b) and 29 C.F.R. § 1601.13 (1972), specifying the "circumstances of the alleged unlawful employment practice." (Section 706(b)). As a result, American was deprived of any opportunity to present evidence or its position with respect to those circumstances as provided by 29 C.F.R. § 1601.14 (1972). The EEOC also failed to give American an oppor-

---

* Absent such a charge by a female, any member of the EEOC could have filed such a charge pursuant to Section 706(b) and 29 C.F.R. § 1601.10 (1975).

** In all instances, citation is to the provision of 29 C.F.R. § 1601.1 *et seq.* in effect during the period of the EEOC investigation.

tunity to utilize the predecision conciliation procedure set forth in 29 C.F.R. § 1601.19c (1972) with respect to the allegations of female sex discrimination. Nor was American given an opportunity to file exceptions to findings of fact as to discrimination against females as then required by 29 C.F.R. § 1601.19b(a) (1972). The EEOC's investigation required by Section 706(b) and 29 C.F.R. § 1601.14 (1972), was thus incomplete and inadequate as to the allegations relating to females and, in turn, rendered unreasonable the "determination of reasonable cause" required by Section 706(b) and 29 C.F.R. § 1601.19d(a) (1972). The conciliation required by Section 706(b) became meaningless as to those allegations because American was caught by surprise, not having had any notice thereof until the determination of reasonable cause had already been made, when it was too late to influence that determination. As Judge Widener recognized in his dissent in *EEOC* v. *General Electric Co.*, 532 F. 2d 359 (4th Cir. 1976):

> "There are no administrative 'settlement discussions' once a finding of reasonable cause has been made, conciliation after that time going only to remedy." (532 F.2d at 375).

Finally, the EEOC failed to send American the notice required by 29 C.F.R. § 1601.23 (1975) that conciliation was terminated unless American wished to reopen discussions; the failure to send this notice was the precise basis upon which the court in *Hickey-Mitchell, supra,* dismissed the EEOC complaint.

In permitting the EEOC to maintain suit notwithstanding all these violations, the court of appeals relied upon its decision in *EEOC* v. *General Electric Co., supra,* without stating more. In *General Electric,* the Fourth Circuit deliberately chose to place administrative expediency over adherence to the procedural safeguards of Title VII and the EEOC's own regulations. In so doing, it acted in flagrant disregard of Congressional intent, as expressed

in the legislative history to the 1972 amendments to Title VII, emphasizing that the procedural safeguards were "included in the bill to insure that fairness and due process are part of the enforcement scheme." (S. Rep. No. 92-415, 92d Cong., 1st Sess. 25 (1971)).

The court of appeals also erroneously reasoned in *General Electric* that even if conciliation was rendered somewhat ineffectual by new allegations raised when the employer could no longer present its position in an attempt to preclude a reasonable cause determination, it was merely a technical violation because the employer could always defend its position in court. Such reasoning is contrary to this Court's recognition that "[c]ooperation and voluntary compliance were selected as the preferred means for achieving [equality of employment opportunities]," *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 44 (1974). As the Eighth Circuit observed in *Hickey-Mitchell, supra,* "[i]n view of the central role of conciliation in the scheme of Title VII we cannot say the regulation is merely 'technical.' " (507 F.2d at 948). The Fourth Circuit's position is also contrary to this Court's reasoning in *Yellin* and *Accardi, supra,* that dismissal was called for notwithstanding the recognition that petitioner might well have lost even had proper procedure been followed.

The Fourth Circuit is in direct conflict with this Court and the Eighth Circuit on the critical issue of the necessity of the EEOC to follow the provisions of Title VII and its own regulations. Accordingly, this decision of the Fourth Circuit should be reviewed and reversed.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the opinion and judgment of the Fourth Circuit.

Respectfully submitted,

HENRY T. WICKHAM
JOHN F. KAY, JR.
F & M Center
Post Office Box 1122
Richmond, Virginia 23208

PAUL G. PENNOYER, JR.
BERNARD W. MCCARTHY
30 Rockefeller Plaza
New York, New York 10020

Counsel for Petitioners

Supreme Court, U. S.
FILED
JUL 14 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. ...76-46

THE AMERICAN TOBACCO COMPANY,
Petitioner,

v.

JOHN PATTERSON, *et al.*,
Respondents.

AMERICAN BRANDS, INC.,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MAYS, VALENTINE,
DAVENPORT & MOORE
F & M Center
Post Office Box 1122
Richmond, Virginia 23208

HENRY T. WICKHAM
JOHN F. KAY, JR.
F & M Center
Post Office Box 1122
Richmond, Virginia 23208

CHADBOURNE, PARKE,
WHITESIDE & WOLFF
30 Rockefeller Plaza
New York, New York 10020
Of Counsel

PAUL G. PENNOYER, JR.
BERNARD W. McCARTHY
30 Rockefeller Plaza
New York, New York 10020
Counsel for Petitioners

INDEX TO APPENDIX

PAGE

Opinion of the Court of Appeals 1a

Order of the Court of Appeals Denying Petitions for Rehearing 36a

First Memorandum Opinion of the District Court .. 38a

Second Memorandum Opinion of the District Court .. 85a

Report on Job Selection Procedure 103a

Statutory and Regulatory Provisions 113a

I. Statutory Provisions Relevant to Issue of Liability:

Section 703(a), 42 U.S.C. § 2000e-2(a) .. 113a

Section 703(j), 42 U.S.C. § 2000e2(j) .. 113a

II. Statutory Provisions Relevant to the Issue of Front Pay:

Section 706(g), 42 U.S.C. § 2000e-5(g) .. 114a

III. Statutory Provisions Relevant to the Issue of Different Locations:

Section 703(h), 42 U.S.C. § 2000e-2(h) .. 115a

IV. Statutory and Regulatory Provisions Relevant to the Issue of the EEOC's Failure to Follow Procedural Requisites:

Section 706(b), 42 U.S.C. § 2000e-5(b) .. 116a

29 C.F.R. § 1601.10 ..... 117a

29 C.F.R. § 1601.11(a) 118a

29 C.F.R. § 1601.13 ..... 118a

PAGE

29 C.F.R. § 1601.14 ..... 118a
29 C.F.R. § 1601.19b(a) 119a
29 C.F.R. § 1601.19c 119a
29 C.F.R. § 1601.19d(a) 120a
29 C.F.R. § 1601.23 ..... 120a

Opinion United States Court of Appeals for the Fourth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1259

JOHN PATTERSON, MARION MOSHOE, EDMUND PAGE, JAMES RANDOLPH, and PERCY TAYLOR, each individually and on behalf of all other persons similarly situated,
Appellees,

—v—

THE AMERICAN TOBACCO COMPANY, a Division of American Brands, Incorporated,
Appellant.

No. 75-1260

JOHN PATTERSON, MARION MOSHOE, EDMUND PAGE, JAMES RANDOLPH, and PERCY TAYLOR, each individually and on behalf of all other persons similarly situated,
Appellees,

—v—

Tobacco Workers' International Union, an unincorporated association; Local 182, Tobacco Workers' International Union, an unincorporated association,
Appellants.

No. 75-1261

JOHN PATTERSON, MARION MOSHOE, EDMUND PAGE, JAMES RANDOLPH, and PERCY TAYLOR, each individually and on behalf of all other persons similarly situated,
Appellants,

—v—

THE AMERICAN TOBACCO COMPANY, a Division of American Brands, Incorporated; Tobacco Workers' International Union, an unincorporated association; Local 182, Tobacco Workers' International Union, an unincorporated association,
Appellees.

No. 75-1262

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Appellee,

—v—

Local 182, Tobacco Workers' International Union (AFL-CIO),
Appellant.

No. 75-1263

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Appellee,

—v—

AMERICAN BRANDS, INC., d/b/a American Tobacco Company, Inc.,
Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond. Albert V. Bryan, Jr., District Judge.

Argued May 7, 1975. Decided Feb. 23, 1976

Before WINTER, BUTZNER, and WIDENER, Circuit Judges.

Henry L. Marsh, III; (S. W. Tucker; John W. Scott, Jr.; Randall G. Johnson; Hill, Tucker and Marsh; Jack Greenberg; Elaine R. Jones; Barry L. Goldstein; and Morris J. Baller on brief) for John Patterson, et al.; Henry T. Wickham (John F. Kay, Jr.; Kenneth V. Farino; Mays, Valentine, Davenport and Moore; Chadbourne, Parke, Whiteside and Wolff; Paul G. Pennoyer, Jr.; Arnold Henson;

Bernard W. McCarthy; and Bernard J. Dushman on brief) for The American Tobacco Company and American Brands, Incorporated; Herbert L. Segal (Irwin H. Cutler, Jr.; Walter Lapp Sales; Segal, Isenberg, Sales and Stewart; Jay J. Levit; Stallard and Levit; and James F. Carroll on brief for Tobacco Workers' International Union and Local 182); Margaret C. Poles, Attorney, Equal Employment Opportunity Commission, (Julia P. Cooper, General Counsel; Joseph T. Eddins, Associate General Counsel; and Beatrice Rosenberg and Charles L. Reischel, Attorneys, on brief) for the Equal Employment Opportunity Commission.

BUTZNER, Circuit Judge:

These appeals and cross appeals question certain provisions of a judgment entered in consolidated actions brought by the Equal Employment Opportunity Commission and several black employees of the American Tobacco Co. against the company, the Tobacco Workers International Union, and its Local 182. The case concerns the application of Title VII of the Civil Rights Act of 1964 [42 U.S.C. § 2000e et seq.] and 42 U.S.C. § 1981 to redress race and sex discrimination in working conditions.[1] Following is a summary of the district court's decision and our disposition of the assignments of error:

I. The district court defined the class of black employees as those, whether currently employed or not, who worked on or after July 2, 1965, the date Title VII became

[1] 42 U.S.C. § 2000e2 [*sic*] prohibits both employers and labor organizations from engaging in employment practices that discriminate on the basis of race or sex.

42 U.S.C. § 1981 assures all persons the same right to make and enforce contracts as is enjoyed by white citizens.

effective. It found no discrimination in hiring but ruled that the company and the labor organizations had engaged in unlawful employment practices by racial discrimination in the promotion of employees. It ordered American to institute company-wide seniority, eliminate certain lines of progression from lower to higher paying jobs, post definite job descriptions, grant back pay, and adjust pensions and profit sharing plans in amounts to be determined at a subsequent hearing. The court also ordered that white incumbents be bumped from jobs for which senior black employees were qualified.

Neither party has assigned error to the court's finding of no discrimination in hiring. We find no error in the designation of the class. We affirm the finding of discrimination in promotions and approve the relief ordered by the court, except for provisions of the judgment dealing with company-wide seniority and bumping.

II. The district court ruled that the EEOC was empowered to bring suit to eliminate discrimination against women, although the initial charge dealt only with discrimination against men. It defined the class of aggrieved women in terms similar to those used to describe the class of black employees. The court found discrimination in promotions but not in hiring, and it ordered relief similar to that afforded black employees.

On these issues we affirm the district court, modifying only its grant of relief.

III. The district court found discrimination in the selection of supervisors and ordered the company to prepare written job descriptions and objective criteria for appointments. It also ordered preferential hiring of blacks and women to fill supervisory vacancies.

We affirm these aspects of the court's judgment except for those dealing with preferential hiring.

IV. The district court held that the actions were timely filed, that the statute of limitations for an action brought under § 1981 is five years, and that the statute is not tolled by filing a charge with the EEOC. It also held that back pay for discrimination against women should accrue from two years before the charge was filed.

Except for the application of the five-year statute of limitations and the accrual of liability for the women's back pay, we affirm these rulings. The proper limitation, we hold, is two years, and the accrual date for back pay must be reexamined in light of EEOC v. General Electric Co., —— F.2d ——, No. 74-1974 (4th Cir. 1975), which was decided after the district court wrote its opinion.

I

American operates three facilities in Richmond, Virginia. The "Virginia Branch" makes cigarettes; the "Richmond Branch" makes pipe tobacco; and the "Richmond Office" keeps accounts and records for both branches. Approximately 250 of the 1,280 employees at both branches are black, and in the Richmond office 13 of the 62 employees are black. In each branch the prefabrication department blends and prepares tobacco before sending it to the fabrication department, which manufactures the finished products. Workers in prefabrication generally earn less than those in fabrication, and most employees at the Richmond branch make less than those at the Virginia branch.

Before 1963 the union and the company overtly segregated employees by race with respect to job assignments, cafeterias, restrooms, lockers, and plant entrances. White employees were represented by Local 182 of the Tobacco Workers International Union, while black employees were represented by Local 216. Blacks were generally assigned to positions in the prefabrication departments. The higher paying jobs in fabrication were largely reserved for white employees. Each department had its own seniority roster,

on which promotions depended. Employees could not transfer from one department to another without forfeiting their seniority.

In September 1963 the black union was assimilated by the white Local 182 to comply with an executive order relating to the government's purchase of supplies. Simultaneously, the company abolished departmental seniority, but it continued to maintain separate rosters at the two branches. The 1963 changes did not eliminate racial discrimination from the company's promotion practices. The district court found that until 1968 the company utilized a system of unwritten qualifications which denied black employees access to the higher paying jobs at the Virginia branch. For certain positions an employee had to be familiar with the duties of the new job in the opinion of his supervisor. Also, he had to work a minimum number of hours on a temporary basis to qualify as an operator of a making or packing machine. Consequently, black employees not working in proximity to the higher paying jobs had limited opportunity to qualify, regardless of their seniority. Combined with static employment in the tobacco industry, this system allowed little advancement of black employees from jobs in prefabrication to those in fabrication. Indeed, from 1963 to 1968 there was an increase of only four blacks in the fabrication department at the Virginia branch.

The Richmond branch had no qualification restrictions on promotions. Instead, supervisors canvassed employees, seeking the senior worker willing to fill a vacancy. There were, however, no written job descriptions. This system provided slight opportunity for black employees to move from prefabrication to fabrication, and from 1963 to 1968, there was an increase of only six black employees in the latter department. As of 1968, only three of the 26 machine operators were black.

In January 1968 the company discontinued its qualifications system. Instead, it posted vacancies and promoted the senior employee who bid for the job. The district court found that this innovation was "facially fair and neutral" but ordered that it be implemented by posting written job descriptions. Furthermore, the district court found that access to certain jobs was barred to black employees by lines of progression and the maintenance of separate seniority rosters for each branch.

Although the company and the union have taken steps in recent years to correct some of the inequalities of the past, the lines of progression, the lack of definite written job descriptions, and barriers to transfer between the branches remain impediments to fair and neutral employment practices. Much must still be done to eradicate any taint of racial discrimination at the plant. The most recent figures available indicate that as of the end of 1973, more than 80 percent of all the employees in the Virginia branch's prefabrication department were black, while in the fabrication department only about 14 percent were black. At the Richmond branch, black employees' penetration into the fabrication department was greater, with blacks comprising more than 38 percent of the workforce. But the lower paying prefabrication department remained almost completely segregated; 92 percent of its employees were black. These figures provide ample support for the district court's findings that "[t]raditionally, at both branches there have been more blacks in the prefabrication department than whites, and more whites in the fabrication department than blacks."

The company emphasizes that from July 2, 1964, to March 1, 1974, 25 percent of all employees promoted and 20 percent of those advanced to operate automatic machinery at the Virginia branch were black. Also, since the initiation in January 1968 of the posting and bidding procedure,

51.5 percent of the successful bidders have been black. These gross figures, however, include promotions in both prefabrication and fabrication departments, and, while laudable, they do not address the crucial issue of the case —the entry of black employees into the historically white fabrication department. Apart from the fact that many of these promotions were made after charges were filed with the EEOC, the company's reliance on the overall promotion rate in both departments misses the mark because blacks have always been promoted in the historically black prefabrication department. Moreover, as late as 1973, of the approximately 200 hourly-paid, non-craft job classifications at Virginia, 18 had never been held by whites and 10 had never been held by blacks. Even more rigid segregation characterized the Richmond branch; of the approximately 43 hourly-paid, non-craft job classifications, 21 had never been held by whites and nine had never been held by blacks.

We conclude, therefore, that the record amply supports the district court's finding that after the effective date of Title VII the company and the union discriminated in the promotional policies of their bargaining agreements and practices. Tested by familiar standards, the court's findings must be sustained.[2]

We next consider the assignments of error that challenge the relief ordered by the district court. The directive that definite job descriptions must be provided in order to implement a fair method of promotion was clearly warranted. *Cf.* Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir. 1972).

In those jobs that were filled according to lines of progression, an employee had to work in the first job before

[2] Federal Rule of Civil Procedure 52(a) provides in part that "[f]indings of fact [by the court] shall not be set aside unless clearly erroneous . . ."

proceeding to the next, and so on up to the highest job in the line. Most of these jobs were in the fabrication departments. Since black employees had been largely excluded from the fabrication departments, they held few jobs in most of these lines and could not advance despite their seniority. In this respect, the lines of progression perpetuated the effects of past discrimination in a manner similar to the formerly segregated departmental seniority rosters. On the basis of its evaluation of conflicting expert testimony, the district court held that only three of the nine lines are justified by business necessity.[3] For the others, alternative means such as on-the-job training are available to provide competent workers.

Addressing the discrimination caused by lines of progression, we pointed out in Robinson v. Lorillard Corp., 444 F.2d 791, 799 (4th Cir. 1971), that the vagaries of chance inherent in this promotion system might bar a qualified worker from advancement for years, although he could learn to perform the job competently in a relatively short time. To deal with such situations, we formulated the following standard for ascertaining whether a condition of employment was justified by business necessity:

> "[T]he applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must

[3] The three positions for which lines of progression can be maintained are adjuster, overhaul adjuster and adjuster prefabrication.

> be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact." 444 F.2d at 798.

Measured by this test, the district court's elimination of the six lines of progression was correct.

The district court also ordered a single seniority roster for the Virginia and Richmond branches to enable employees in each branch to bid for posted jobs in the other. The order is designed to correct the present effect of past discrimination, which denied black employees entry into the higher paying jobs of the fabrication departments, particularly at the Virginia branch. For example, under the present method of job assignments, a black employee hired in 1955 at the Richmond branch prefabrication department has no realistic opportunity to secure a higher paying job in the formerly white Virginia fabrication department because he cannot transfer his company seniority to the Virginia branch. If he seeks a new job there, he must forfeit his seniority and start as a new hire.

The district court correctly found that the denial of transfer between the branches without retention of company seniority perpetuates the effect of past discrimination. We believe, however, that the relief ordered by the district judge is broader than necessary. Title VII does not require the company or the union to forego the benefits of separate, nondiscriminatory seniority rosters. "Application of the Act normally involves two steps. First, identification of the employees who are victims of discrimination, and second, prescription of a remedy to correct the violation disclosed by the first step. The Act does not require the application of the remedy to employees who are not subject to discrimination." United States v. Chesapeake and Ohio Ry., 471 F.2d 582, 593 (4th Cir. 1972). The only employees who suffered discrimination were blacks who could not obtain jobs in the fabrication departments because of their race. Consequently, they are the only employees who should be allowed to transfer under the posting and bidding system from one branch to the fabrication department in the other branch on the basis of their company seniority. Black employees need not be allowed to transfer with company seniority to jobs in prefabrication, because they were never barred from these jobs in the first place. Similarly, white employees seeking transfers are not entitled to utilize company seniority, because they were never barred from fabrication departments. Finally, no employee hired after the cessation of discrimination in job assignments need be allowed to transfer with seniority intact. *See, e.g.,* Russell v. American Tobacco Company, —— F.2d ——, No. 74-1650 (4th Cir. 1975); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971); Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (E.D. Va. 1968).

The company and the union assert that this case is distinguishable from departmental seniority cases like *Robinson* because the Richmond and Virginia branches are in different locations. They emphasize that the branches make different products, have different managements, hire separately, and are some distance apart. For these reasons, they argue, the case falls within 42 U.S.C. § 2000e-2(h), which provides that:

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . ."

Noting that neither the Act nor the regulations define the statutory term "employees who work in different locations," we recently construed § 2000e-2(h) in Russell v. American Tobacco Co., —— F.2d ——, No. 74-1650 (4th Cir. 1975). We pointed out that the labor market is the most important factor in determining whether a company's employees work in different locations. A company operating two or more of its plants with employees who are from the same geographic area and who are unskilled or possess the same skills can assign an applicant to an entry level position in either plant. Therefore, employees the company hired from the same labor market would not generally fall within the statutory class of "employees who work in different locations."

On the other hand, even though a company's plants are in the same city, as they are here, their proximity does not conclusively show that they are in the same location. If one plant requires labor possessing skills different from those of workers at another plant, the company cannot draw from the same labor market to man its plants. Under these circumstances, employees would work at different locations, even though they reside and work in the same geographic area.

American hires employees for both branches from the same labor market. The branches are only a few city blocks apart. There are entry level jobs at both places that require neither particular skills nor experience, and jobs in fabrication can be filled just as well by transferees as by persons hired off the street.

Other facts support the district court's finding that these plants are not in different locations. The same bargaining agreement covers employees at both plants, and the company has contractually reserved the right to shift employees from one plant to the other without depriving them of seniority. The Richmond office, located in a building

at the Virginia branch, serves both branches, and the Virginia branch ships the Richmond branch's products.

There is another reason why the exemption granted in § 2000e-2(h) is not available to American. As we noted in *Russell, supra,* slip op. at 10, that section contains a proviso that restricts its application to situations where differences in the conditions of employment "are not the result of an intention to discriminate." Past intentional segregation that is perpetuated by a company's seniority system precludes it from claiming that its system is bona fide within the meaning of § 2000e-2(h), Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971). Similarly, "where present differences in working conditions are remnants of past intentional discrimination, the proviso of § 2000e-2(h) bars a company from defending its employment practices on the ground that its employees work in different locations." Russell v. American Tobacco Co., —— F.2d ——, ——, No. 74-1650 (4th Cir. 1975), slip op. at 11.

We therefore affirm the district court on this issue but note that on remand it should vacate the provision of its judgment requiring a single seniority roster for both branches. It should substitute an order allowing those black employees who formerly could not obtain jobs in the fabrication departments because of discrimination to utilize their company seniority to bid for such jobs in the fabrication department of either branch. Of course, an employee who transfers must have the capacity to perform the job after receiving a reasonable amount of training.

The company and the union also assign error to the part of the district court's order that allowed senior black and female employees to bump junior employees from preferred jobs. The court ordered immediate company-wide posting and bidding on each non-supervisory job in the Richmond and Virginia branches. The only qualifica-

tions for advancement were to be seniority and a willingness to learn the job. To facilitate the bidding, the court ordered that job descriptions be posted. It further provided that employees who were displaced by senior black or female workers, and therefore had to move to lower paying jobs, must be paid as much as they were in their former jobs. The court explained the reason for this provision of its decree as follows:

> "The present system of posting and bidding adopted in 1968 is fair, although it needs, in the Court's view, further implementation. As indicated in the findings of fact, however, black and female employees in the Richmond Branch and the Virginia Branch have been locked in their jobs as a result of prior discriminatory practices. This is because of the static condition of the tobacco industry generally, and American in particular, and the advent of automation, both of which have limited opportunities for upward movement of present employees and for new hiring." (Appendix at 37-38.)

The court's description of the lack of employment opportunities is well supported by the evidence. No new employees were hired to fill jobs under jurisdiction of the union from September 12, 1955, through June 12, 1964, in the Richmond branch and May 12, 1966, in the Virginia branch. Employment in both branches decreased from 1953 to 1973 by approximately 1300 workers.

One of the early questions about the construction of Title VII was whether "present consequences of past discrimination [are] covered by the act." Quarles v. Philip Morris, Inc., 279 F.Supp. 505, 510 (E.D. Va. 1968). The generally accepted answer is a qualified "yes": employers and unions using pre-Act discriminatory practices to bar employees from filling post-Act vacancies violate the Act. Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971);

Quarles, supra. On the other hand, Title VII has not been construed to impose a duty to demote incumbents. In Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), the court rejected the contention that "allowing junior whites to continue in their jobs constitutes an act of discrimination." Judge Wisdom, writing for the court, said:

> "The Act should be construed to prohibit the *future awarding* of vacant jobs on the basis of a seniority system that 'locks in' prior racial classification. White incumbent workers should not be bumped out of their *present* positions by Negroes with greater plant seniority; plant seniority should be asserted only with respect to new job openings. This solution accords with the purpose and history of the legislation." 416 F.2d at 988.

Every appellate court to whom the issue has been presented has accepted this interpretation.[4] Equally important, when Congress was considering the 1972 amendments to Title VII, it approvingly noted *Papermakers'* construction of the Act.[5]

These precedents cannot be satisfactorily distinguished on the ground that bumping would be required only when the proof discloses a static industry that has few vacancies. The difference between static and dynamic indus-

---

[4] *E.g.,* EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975); United States v. N. L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973); United States v. Chesapeake & Ohio Ry., 471 F.2d 582 (4th Cir. 1972); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971).

[5] The section-by-section analysis of the House bill states that "it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII." Legislative History of Equal Employment Opportunity Act of 1972, Government Printing Office (1972) at 1844. *Papermakers,* of course, was a prominent part of that case law.

tries is not always readily ascertainable because employment opportunities fluctuate for many reasons over long and short periods. Requiring bumping for static industries while denying it in dynamic industries would introduce into the administration of the Act countless variables for which Congress has made no provision.

Since the Act should not be applied retroactively,[6] it is, of course, much easier to justify the retention of incumbents who obtained their positions before the effective date of the Act than the retention of those who were unlawfully preferred after this date. Nevertheless, neither Congress nor the EEOC nor the courts have drawn a distinction between pre-Act and post-Act incumbents. The reasons for applying the Act uniformly are largely pragmatic. The enactment of Title VII was the result of many concessions, including the unequivocal assertion by proponents of the legislation that it was not intended to be used to displace incumbent workers.[7] A primary goal of Title VII is to induce voluntary compliance by employers and unions. Section 2000e-5; *see* EEOC v. Hickey-Mitchell Co., 507 F.2d 944, 948 (8th Cir. 1974). Demoting employees, especially those who are not responsible for wrongdoing, undoubtedly would encounter more resistance

---

[6] This principle is established by the legislative history. Senators Clark and Case, two of the bill's sponsors, circulated an interpretative memorandum stating that Title VII's operation was "prospective and not retrospective . . . (T)he employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis." 110 Cong. Rec. 6992 (daily ed. April 8, 1964), quoted in Quarles v. Philip Morris, Inc., 279 F.Supp. 505, 516 (E.D. Va. 1968).

[7] The Clark-Case memorandum, note 6 *supra*, states that an employer "would not be obliged—or, indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of white workers hired earlier." 110 Cong. Rec. 6992 (daily ed. April 8, 1964).

than deferring their future expectancies. As this case illustrates, bumping is an unsettling process. Its domino effect adversely affects employees who have done no wrong and who, indeed, may have been the victims of discrimination.[8]

The effects of bumping are exacerbated by another aspect of Title VII. The Act does not provide a definitive catalogue of unlawful employment practices. Congress placed this responsibility on the EEOC and, ultimately, the courts. It soon became obvious that overt discrimination is not the only obstacle to equal employment opportunity.[9] As a result of litigation, many "practices, procedures, or tests neutral on their face, and even neutral in terms of intent" have been exposed as discriminatory and condemned. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971); United States v. Dillon Supply Co., 429 F.2d 800, 804 (4th Cir. 1970). There is no reason to suppose that this process will soon abate. Bumping could mean that employers and workers would likely have their businesses and their working lives rearranged by court decrees from time to time, as various unlawful employment practices are identified. *See generally* Note, Title VII, Seniority Discrimination, and the Incumbent Negro, 80 Harv. L. Rev. 1260, 1274-75 (1967).

---

[8] As part of its compliance with the district court's decree, American conducted a canvass of its employees to determine the effect of bumping. The results of that survey are contained in a report filed with this court to supplement the record. The report showed that 40 employees requested jobs to which their plant-wide seniority would entitle them. One of these has already obtained the job he requested. The others would bump eight white male employees and 31 minority employees out of the jobs they now occupy. We stayed the provision of the decree that required bumping pending this appeal.

[9] *See generally* Introduction, The Second Decade of Title VII: Refinement of the Remedies, 16 Wm. & Mary L. Rev. 433, 436-37 (1975).

Finally, although Congress did not intend the Act to be used as a vehicle for displacing incumbents, it did not leave the victims of discrimination without a remedy. Section 2000e-5(g) expressly authorizes a district court to award them back pay. While an employee who has been unlawfully denied a promotion must await a vacancy before advancing, he need not prove that a vacancy exists in order to qualify for back pay. Hairston v. McLean Trucking Co., 520 F.2d 226 (4th Cir. 1975); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971).

In Albemarle Paper Co. v. Moody, 422 U.S. 405, 408 (1975), the Court explained the standards a district court should follow in awarding back pay to employees who "have lost the opportunity to earn wages because an employer has engaged in an unlawful discriminatory employment practice." The Court said that the back pay provision must be applied in a manner that is "consonant with the twin statutory objectives" of "eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." 422 U.S. at 421.

To satisfy these objectives, back pay must be allowed an employee from the time he is unlawfully denied a promotion, subject to the applicable statute of limitations, until he actually receives it. Some employees who have been victims of discrimination will be unable to move immediately into jobs to which their seniority and ability entitle them. The back pay award should be fashioned to compensate them until they can obtain a job commensurate with their status. This may be accomplished by allowing back pay for a period commencing at the time the employee was unlawfully denied a position until the date of judgment, subject to the applicable statute of limitations. This compensation should be supplemented by an award equal to the estimated present value of lost earnings that are reasonably likely to occur between the date of judgment and the time when the employee can assume his new position. *See* Bush v. Lone Star Steel Co., 373 F.Supp. 526, 538 (E.D. Tex. 1974); United States v. United States Steel Corp., 371 F.Supp. 1045, 1060 n. 38 (N.D. Ala. 1973).[10] Alternatively, the court may exercise continuing jurisdiction over the case and make periodic back pay awards until the workers are promoted to the jobs their seniority and qualifications merit. Or perhaps counsel and the court can devise some other convenient method of taking all the effects of past discrimination into account. In any event, the compensation must include, as the district court properly noted, increments for pensions and profit sharing.

Compensatory pay and adjustment of benefits provide monetary relief for discrimination against minority employees but do not afford the satisfaction that comes from being promoted to a more responsible job. Nevertheless, such an intangible benefit does not justify injunctive relief mandating bumping. Weighed against a minority employee's sense of achievement are the harm that demotion will cause to incumbents who have done no wrong and the disruption of the company's business that bumping entails. The survey of employees referred to in footnote 8, *supra,* indicates that 39 minority employees are seeking jobs held by 8 white men and 31 other minority employees. This survey, however, does not prove that the employees seeking different jobs were motivated even in part by non-monetary factors, for it was conducted on

---

[10] This measure of compensation is analogous to that awarded in an ordinary tort case, where compensation is assessed for one's loss of earnings whether the loss occurs before or after the judgment is entered. The analogy is apt because a statutory action attacking racial discrimination is fundamentally for the redress of a tort. *See* Curtis v. Loether, 415 U.S. 189, 195 (1974).

the assumption that bumping was the only way they could receive better pay and fringe benefits. Since full monetary compensation and the removal of barriers to promotion provide adequate relief to minority employees without disruption to other employees and management, we conclude that neither Title VII nor its legislative history requires bumping in this case.

Relief under § 1981 is limited to correcting racial discrimination. *See* Delavigne v. Delavigne, No. 75-2203, —— F.2d —— (4th Cir. 1976); Willingham v. Macon Telegraph Publishing Co., 482 F.2d 535, 537 n. 1 (5th Cir. 1973). But apart from this, Title VII and § 1981 provide complementary remedies for employment discrimination, Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459-60 (1975). Although the legislative history of Title VII cannot support a decision that bumping relief is unavailable under § 1981, the pragmatic considerations we advance apply with equal force to the § 1981 claim. Moreover, "in fashioning a substantive body of law under § 1981 the courts should, in an effort to avoid undesirable substantive law conflicts, look to the principles of law created under Title VII for direction." Waters v. Wisconsin Steel Works of International Harvester Co., 502 F.2d 1309, 1316 (7th Cir. 1974). For these reasons, we hold that bumping relief is not available to American's black employees under § 1981.

On remand, therefore, the district court should modify its decree to eliminate bumping, but it should take steps to assure that back pay will be computed to include compensation for the entire time that a minority employee is denied a promotion for which he or she is qualified by seniority and ability.

We affirm the district court's award of relief against both the local and the International, except as noted in Part II. The local acquiesced without protest in the lines of progression. Not until 1968 did it negotiate for the

removal of the qualification requirements for promotion. In 1968, 1971, and 1974, it proposed a company-wide seniority system that would have allowed transfers between branches. When the company declined, the union settled for assurances of indemnity that would protect its treasury against the claims of its members.

A union may not bargain away minority employees' rights to equal treatment, *see* Robinson v. Lorillard Corp., 444 F.2d 791, 799 (4th Cir. 1971), and, indeed, it must "negotiate actively for nondiscriminatory treatment" of its minority workers. Macklin v. Spector Freight Systems, Inc., 478 F.2d 979, 989 (D.C. Cir. 1973); *see also* United States v. N. L. Industries, Inc., 479 F.2d 354, 379 (8th Cir. 1973). The Supreme Court has recently emphasized the duty a union owes to its minority members by pointing out that one of the purposes of a back pay award is to spur unions, as well as employers, to evaluate employment practices and eliminate unlawful discrimination. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975). Tested by these principles, the district court's imposition of liability on both the local and the International was warranted by the law and the facts.

Nor can we accept the International's argument that it should not be held liable because it was not responsible for the contracts negotiated by the local. The evidence disclosed that a vice president of the International acted as an "advisor" to the local, playing an active role as the president's deputy in the 1971 and 1974 negotiations for bargaining agreements. Moreover, the constitution of the International provides:

> "It shall be the principal duty of the Local Union to secure satisfactory collective bargaining and working agreements showing an adequate minimum wage and fair working conditions for workers who have become affiliated with the TWIU, provided, however, that no

collective bargaining and working agreement shall be consummated until first submitted to the general president who may approve or reject any proposed agreement, and no such agreement can be executed without the approval of the general president or his deputy."

The district court was not obliged to accept representations of the vice president that contradicted the plain meaning of this provision. The court properly concluded that the International's approval of the bargaining agreement pursuant to this provision made it jointly responsible with the local. Cases dealing with an international union's exoneration of liability to an employer are inapposite where its duties to members of its local unions are at issue.

II

The EEOC's complaint contains allegations of discrimination against women employees. The company contends that the commission lacked authority to press this claim because no female employee filed a charge. On the contrary, the company points out, the only charge of sex discrimination was filed by a male employee. The district court overruled the company's motion to dismiss this aspect of the case, holding that the commission could institute the suit if its investigation of the male employee's complaint disclosed discrimination against women.

We affirm the district court. We recently decided this issue adversely to the company's position in EEOC v. General Electric Co., —— F.2d ——, No. 74-1974 (4th Cir. 1975). The company's argument does not persuade us to depart from the conclusions reached in that case.[11]

---

[11] *See* Part IV *infra* for a discussion of the statute of limitations with respect to this issue.

On the merits of the claim of sex discrimination, we uphold the district court's finding of liability. Because the company's discrimination against women bears many similarities to its discrimination against black employees, we need not recite the evidence in detail. It is sufficient to note that for many years the company overtly segregated jobs by sex, discriminating against women, as the district court found, "with respect to wage structure, departments, seniority and hiring." Even after these practices were nominally eliminated in 1963, their discriminatory effect was perpetuated by lack of definite job descriptions, lines of progression, and obstacles to transfers. The court found that as recently as 1973, 23 of the approximately 200 non-craft, hourly-paid jobs at the Virginia branch had not been held by women, and six had not been held by men. At the Richmond branch, 32 of the 43 non-craft, hourly-paid jobs had not been held by women, and six had not been held by men. The company has not demonstrated that these segregated positions cannot be filled by persons of the opposite sex. The court also found that from 1967 through 1972 women had a lower mean income than men with comparable seniority.

Again, the district court's findings are supported by the evidence and cannot be set aside as clearly erroneous. The relief the court afforded women is essentially the same as the relief it granted black employees. Accordingly, we approve the relief for women employees, subject, however, to the same modifications of the court's decree that we mentioned in Part I. This relief, however, can be granted only against the company. The complaint against the union for sex discrimination must be dismissed for reasons we will next discuss.

The commission's complaint names the company and Local 182 as defendants. The commission acknowledged that it had not attempted to conciliate the charges with the

union before filing suit. While the suit was pending, it made an offer to conciliate, which the union accepted. In the course of discussion with the union, however, the commission's representative conceded that he had no authority to settle the suit. Understandably, the conciliation efforts were unsuccessful. The district court, viewing the lapse as technical, held that the belated offer to conciliate and its acceptance substantially complied with the Act.

The Act requires, however, that after receiving a charge and before bringing a suit the commission must take four steps: serve the charge on the employer and labor organization, investigate the charge, determine that reasonable cause exists to believe the charge is true, and endeavor to eliminate alleged unlawful employment practices "by informal methods of conference, conciliation, and persuasion."[12] The 1972 amendments to Title VII empowered the commission to sue if it is unable to secure an acceptable conciliation agreement.[13] This provision of the Act has been construed to create an express condition on the commission's power to sue. Consequently, a suit brought by the commission before attempting conciliation is premature. EEOC v. Hickey-Mitchell Co., 507 F.2d 944, 947-48 (8th Cir. 1974); EEOC v. E. I. DuPont de Nemours & Co., 373 F. Supp. 1321, 1333-34 (D. Del. 1974); EEOC v. Westvaco Corp., 372 F.Supp. 985, 991-93 (D. Md. 1974).[14]

---

[12] 42 U.S.C. § 2000e-5(b).

[13] 42 U.S.C. § 2000e-5(f)(1).

[14] We have held that the commission's failure to attempt conciliation is not a jurisdictional bar to an employee's action, because the employee cannot be charged with the commission's failure to execute its statutory duties. Russell v. American Tobacco Co., —— F.2d ——, ——, No. 74-1650 (4th Cir. 1975); Johnson v. Seaboard Air Line R.R., 405 F.2d 645 (4th Cir. 1968). These cases, however, are inapposite where the commission's power to sue is in question.

We recently emphasized that the commission's statutory duty to attempt conciliation is among its most essential functions.[15] It is particularly important for the commission to attempt conciliation with a union when investigation discloses that provisions of a bargaining agreement concerning seniority and job assignments are causing the alleged unfair employment practices. Then the employees who enjoy majority status are frequently more directly affected than their employer by changes that will advance minority employees. In such cases, the success of conciliation often hinges on the union's response.

We do not rule out the possibility that exceptional circumstances may excuse a failure to attempt conciliation, but that is not the case here. The union's willingness to negotiate even after suit was brought tends to negate any suggestion that timely conciliation of the sex discrimination charges would have been unsuccessful. When it became apparent that the commission's representative lacked authority to settle the case, the possibility of conciliation was dealt a severe blow by the very circumstances Congress sought to avoid—commencement of a civil action before attempting conciliation. Accordingly, we conclude that the district court should have dismissed the part of the commission's complaint which alleges that Local 182 caused the company to discriminate unlawfully on the basis of sex.

III

The district court also found that the company had engaged in race and sex discrimination in appointing supervisors. The evidence supports this finding. At both the Richmond and Virginia branches, the entry level position

---

[15] EEOC v. Raymond Metal Products Co., —— F.2d ——, ——, No. 75-1007 (4th Cir. 1976).

for supervisory personnel is assistant foreman. The company fills about 34 percent of the vacancies in this position by promoting hourly employees; it fills the balance by hiring new applicants. With no formal, objective, written standards for appointment, the company relies in part on recommendations from the union, which also lacks objective standards. Until 1963 the company appointed only white males to supervisory posts, and the enactment of Title VII failed to effect any immediate change in this policy. At the Richmond branch, the first black supervisor was appointed in 1966 and the second in 1971. As of June 1, 1973, there were only three, constituting 9.6 percent of the supervisory force of 31. In 1967 the company named its first female supervisor at the Richmond branch. By 1973 two (6 percent) of the 31 supervisors were women. At the Virginia branch, a black employee was promoted to assistant foreman in 1963. In the next decade four more were appointed, so that by 1973 7.24 percent of the 69 supervisors were black. The first female was not appointed as a supervisor at this branch until 1972. Two more were appointed by June 1, 1973.

Before the trial of the case, neither a black employee nor a woman had ever been appointed to a supervisory position at the Richmond office. The court noted, however, that a vacancy existed, and the company proffered additional evidence that as of November 1, 1974, the Richmond office had one black supervisor and one white female supervisor on a staff of eight.

The district court enjoined the company from "implementing, maintaining, or giving effect to any criteria utilized for the selection of supervisory personnel which is designed to or has the effect of discriminating against black or female candidates for supervisory positions." It ordered the company to post job descriptions for these positions and to devise objective criteria for selecting new appointees. The propriety of these provisions of the

court's decree is well settled. *See* Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377, 1383 (4th Cir. 1972); Rowe v. General Motors Corp., 457 F.2d 348, 358-59 (5th Cir. 1972). We think, however, that on remand the court's decree should be enlarged to require the union to publish objective criteria for making its recommendations for supervisory appointments.

Finally, the district court ordered that vacancies in the assistant foreman, foreman, and office supervisory positions must be filled with qualified blacks and women, except when none can be found, until the percentage of blacks and women equals the percentage of these classes of workers in the Richmond Standard Metropolitan Statistical Area (SMSA). The company's attack on this provision of the decree is two-pronged. First, it contends that Title VII condemns preferential hiring, especially when, as here, the preferences are absolute. It relies primarily on § 703(j) of the Act, 42 U.S.C. § 2000e-2(j), which provides in part:

> "Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . [or] sex . . . of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . [or] sex . . . employed . . . in comparison with the total number or percentage of persons of such race . . . [or] sex . . . in any community . . . or in the available work force in any community. . . ."

This section plainly bans the use of preferential hiring to change a company's racial imbalance that cannot be attributed to unlawful discrimination. In Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971), the Court said:

> "Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifica-

> tions. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."

Uniformly, however, Title VII has been construed to authorize district courts to grant preferential relief as a remedy for unlawful discrimination. Rios v. Enterprise Association Steamfitters Local 638 of U.A., 501 F.2d 622, 628-31 (2d Cir. 1974); United States v. N. L. Industries, Inc., 479 F.2d 354, 377 (8th Cir. 1973); Southern Illinois Builders Association v. Ogilvie, 471 F.2d 680, 683-86 (7th Cir. 1972); United States v. Ironworkers Local 86, 443 F.2d 544, 552-53 (9th Cir. 1971); United States v. International Brotherhood of Electrical Workers, Local No. 38, 428 F.2d 144, 149-51 (6th Cir. 1970); Local 53 of International Ass'n of Heat & Frost I. & A. Workers v. Vogler, 407 F.2d 1047, 1053-54 (5th Cir. 1969). This construction of the Act is in harmony with other cases which authorize preferential relief from unlawful employment discrimination in situations where Title VII is not applicable. Associated General Contractors of Massachusetts, Inc. v. Altshuler, 490 F.2d 9, 16-18 (1st Cir. 1973); Carter v. Gallagher, 452 F.2d 315, 330 (8th Cir. 1971); Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159, 172, 176-77 (3d Cir. 1971). In all, eight circuits have approved some form of temporary preferential relief for discriminatory employment practices. *See* Sape, The Use of Numerical Quotas to Achieve Integration in Employment, 16 Wm. & Mary L. Rev. 481, 499 (1975). No court of appeals has ruled to the contrary, although there have been dissents.

We have not previously ruled on the issue, but in a case involving the Civil Rights Act of 1866 and the thirteenth and fourteenth amendments, we declined to impose quotas where the district court concluded that adequate relief could be obtained without their use. *See* Harper v. Kloster, 486 F.2d 1134, 1136 (4th Cir. 1973). In view of the substantial precedent sanctioning preferential relief for unlawful discrimination, we reject the company's argument that Title VII forbids the remedy ordered by the district court. We recognize, however, that cases which approve such remedies caution that the necessity for preferential treatment should be carefully scrutinized and that such relief should be required only when there is a compelling need for it. *See* Associated General Contractors of Massachusetts, Inc. v. Altshuler, 490 F.2d 9, 17 (1st Cir. 1973). This brings us to the company's second reason for vacating the decree's provision for preferential appointment of supervisors.

The company argues that its appointment of black and female employees to supervisory positions already exceeds the ratio that preferential relief would require. Its argument rests on two premises. One, its conduct before the effective date of Title VII does not provide a proper base to measure its compliance with the Act; instead, it must be judged by the manner in which it filled vacancies after this date. Two, the district court erroneously considered the number of blacks and women in the Richmond SMSA workforce as a whole to ascertain a ratio of acceptable performance, instead of using only the blacks and women in the Richmond SMSA supervisory workforce.

We believe these premises are well founded. Title VII is not retroactive.[16] It does not provide a remedy for dis-

[16] The legislative history of Title VII indicates that it is not intended to be retroactive. *See* note 6 *supra*.

crimination which occurred before it became effective in 1965. Robinson v. Lorillard Corp., 444 F.2d 791, 795 (4th Cir. 1971). At the Virginia branch 51 of the supervisors were appointed before Title VII prohibited discrimination in their selection. They should not be counted in determining whether preferential hiring is required now. Between 1965 and 1973 the company appointed 18 assistant foremen, the entry level position for supervisors. Of that number, five (27.5 percent) were black and three (16.6 percent) were women. At the Richmond branch, 22 of the supervisors were appointed before Title VII became effective and nine afterwards. Of the nine, three (33.3 percent) were black and two (22 percent) were women. At the Richmond office, the evidence is not as clear. It has six entry level supervisory positions, which at the date of trial were filled by five white males with one vacancy. The district court found that four of the six positions had been filled after 1965. Subsequently, the company proffered evidence that it has promoted one black employee and one female to supervisory positions, constituting for each classification 16.6 percent of the appointments since 1965.[17]

The record discloses that 6.8 percent of the blacks and 1.5 percent of the women in the Richmond SMSA are placed in a category that includes supervisory personnel. Those percentages furnish a more realistic measure of the company's conduct than the gross percentage of blacks and women in the whole workforce, including unskilled labor. *See* Harper v. Mayor, 359 F.Supp. 1187, 1193 n.5 (D. Md.), *aff'd sub nom.* Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973).

[17] The district court declined to reopen the record to consider this proffer. Under the ratio that the court used for comparative purposes, the evidence had but slight probative effect. Its import, however, is magnified by acceptance of the company's premise that its performance since 1965 is what must be examined in determining whether it has violated the Act. On remand the court should reexamine the situation at the Richmond office.

The fact that the company's appointments since 1965 exceed the ratio of qualified blacks and women in the workforce does not exonerate the company for the violations of the Act which the district court found. The tardy appointments of blacks and women to supervisory positions long after the passage of Title VII and the present lack of published job descriptions and objective selection procedures fully justify the injunctive relief the district court ordered. We believe, however, that the rate at which the company currently appoints blacks and women to supervisory positions is sufficient to show that there is no compelling need for the imposition of a quota.[18] *But see* Karst & Horowitz, Affirmative Action and Equal Protection, 60 Va. L. Rev. 955 (1974).

IV

The company contends that the charge filed with the EEOC on January 3, 1969, was not timely because there were no discriminatory practices at either branch after January 15, 1968. It argues that for this reason the action should be dismissed for failure to meet the jurisdictional requirement of a timely charge.[19] The district court, however, found that the discrimination was of a continuing nature and properly held that the charge was timely. Williams v. Norfolk & Western Ry., —— F.2d ——, No.

[18] We do not mean to suggest that the company may use its percentage of black and female supervisors as a defense to future charges of discrimination against blacks and women. It must consider each application on its merits. If the company discriminates against a black or a woman, it can be called to account for violating Title VII, regardless of the percentage of blacks and women among its supervisors.

[19] Before the 1972 amendments to Title VII, a charge had to be filed with the EEOC within 90 days of the alleged unlawful employment practice. 42 U.S.C. § 2000e-5(d) (1964). In 1972, this period was changed to 180 days. 42 U.S.C. § 2000e-5(e).

74-1549 (4th Cir. 1975); Macklin v. Spector Freight Systems, Inc., 478 F.2d 979, 994 (D.C. Cir. 1973); *see* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 467 n.13 (1975) (dictum).

The district court ruled that the filing of the charge in 1969 did not toll the statute of limitations for the § 1981 action which was filed in 1973. The Supreme Court recently confirmed the district court's correct understanding of the law. Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975).

The district court applied the Virginia five-year statute of limitations to the § 1981 action. We have ruled, however, that the state's two-year statute applies to § 1982 actions. Allen v. Gifford, 462 F.2d 615 (4th Cir. 1972). Both § 1981 and § 1982 were enacted to redress infringements of closely related civil rights. We conclude, therefore, that the same two-year statute should apply to § 1981 actions. *Accord,* Revere v. Tidewater Telephone Co., No. 73-1390 (4th Cir., October 2, 1973) (unpublished opinion applying the two-year statute to a § 1981 action); *cf.* Almond v. Kent, 459 F.2d 200 (4th Cir. 1972). Accordingly, on remand, the two-year statute of limitations should be applied to the § 1981 claim. Of course, the point has little practical significance in this case in view of the fact that the § 1981 action was not tolled by the filing of the charge with the EEOC.

The district court ruled that back pay for sex discrimination should accrue from April 8, 1967, two years before the charge was filed with the EEOC. The two-year period mentioned by the district judge conforms with the statute.[20] However, this charge did not allege discrimination against women. Instead, this type of discrimination was initially disclosed by the EEOC's investigation.[21] Dealing with

---

[20] 42 U.S.C. § 2000e-5(g).

[21] *See* Part II *supra.*

similar circumstances, we held in EEOC v. General Electric Co., —— F.2d ——, No. 74-1974, slip op. at 34-36 (4th Cir. 1975), that in the absence of countervailing equities a trial court should limit back pay to two years before the employer received notice of the results of the investigation. On remand the district court should reconsider its decree in light of this case.

The judgment is affirmed in part and modified in part, and the case is remanded for further proceedings consistent with this opinion.

WIDENER, Circuit Judge, concurring and dissenting:

I concur in large part with the opinion of the court for the reasons stated in the opinion. I differ, however, in some respects, and as to those I respectfully dissent.

So far as the opinion is based on *EEOC* v. *General Electric Company,* No. 74-1974 (4th Cir. 1975), I dissent for the reasons set forth in my dissent in that case, our judgment in which is not yet final. I should say, however, that this case may be a somewhat closer one than *General Electric* because here, at least, sex discrimination was the subject of the EEOC complaint, while in *General Electric* it was not. This case points up the importance of requiring the EEOC to comply with its own regulations as well as the statute. The union here is excused from liability for discrimination on account of sex because the statute was not complied with. The reason especially emphasized and held is that ". . . a suit brought by the commission before attempting conciliation is premature," p. 31, because ". . . the commission's statutory duty to attempt conciliation is among its most essential functions." p.32. Despite the fact that both the company and the union were deprived of the first conciliation step as set forth in 29 CFR § 1601.19a, as well as the statutory benefits of conciliation attempts, the company is held to liability, while the union is not, although the liability was caused by the collective bargain-

ing agreement signed by both the company and the union. Thus, I dissent not only from the finding against the company, but also from the disparate treatment awarded the company and the union on facts which are indistinguishable.

While the subject of collective bargaining agreements is at hand, I should say I have grave reservations about considering evidence in this type case of the respective positions taken by the company and the union in negotiations leading up to collective bargaining agreements when the agreement results in unlawful discrimination. This is tantamount to allowing a good faith defense disapproved by us in *Moody* v. *Albemarle Paper Company,* 474 F2 134 (4th Cir. 1973). (Modified on other grounds, 422 US 405 (1975). [*sic*]

The district court had only this to say about damages:

> "The formulation of the method of calculation and distribution of the back pay award and adjustment to the pension and profit-sharing plans will be complex—sufficiently so as to tax the ingenuity and good faith of counsel. In this regard counsel are directed to confer with a view to agreeing on a plan of calculation and distribution of the back pay award for submission to the Court—and, indeed, to explore the possibility of settling the monetary aspects of the case." App. p. 42.

With the opinion of the district court in mind, it is seen that the method of computing damages was not considered by that court and is not properly before this court, *McGowan* v. *Gillenwater,* 429 F2 586 (4th Cir. 1970) [*sic*], so the detailed discussion of that subject is a dictum. If the district court, in ascertaining damages, adopts standards with which either side is in disagreement, either is at perfect liberty to appeal the award. Taking up the matter now, and especially its treatment in detail, when the matter is so "complex" as to "tax the ingenuity and good faith of

counsel," and upon no record, is too great a departure from what I conceive to be the proper rule of courts expressing opinions only with reference to existing controversies. There is no controversy at this time between the parties about this matter, and an expression of opinion I think beyond the legitimate function of an appellate court. I express no opinion as to the correctness of the dictum.

We hold that the imposition of quotas for supervisory positions is error because the "rate at which the company currently appoints blacks and women to supervisory positions is sufficient to show that there is no compelling need for the imposition of a quota," and, then, in note 18, explain that the maintenance of a quota is not a defense to a charge of racial or sexual discrimination. In view of our holding and note 18 just referred to, I think we go out of our way just earlier in the opinion to justify the imposition of quotas in hypothetical cases.

Since quotas themselves are the rankest kind of discrimination and their application, if valid in any context, requires exaggerated facts not present here, that general subject would be better left for another day.

Senator Clark, one of the sponsors of the statute and one of the Senate floor managers, filed, in Legislative History, 3014, in response to objections made by opponents of the legislation, a series of answers to the objections, among them the following (p. 3015):

> "Objection: The bill would require employers to establish quotas for nonwhites in proportion to the percentage of nonwhites in the labor market area.
>
> "Answer: Quotas are themselves discriminatory."

In view of the fact that the very existence of a quota is constitutionally suspect, the just quoted legislative interpretation of the statute, and our holding, such justification in hypothetical cases I think is out of place.

Order of the Court of Appeals Denying Petitions for Rehearing.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1259
No. 75-1260
No. 75-1261
No. 75-1262
No. 75-1263

JOHN PATTERSON, et als.,

Appellees,

—v—

THE AMERICAN TOBACCO COMPANY, A Division of American Brands, Inc., et als.,

Appellants.

Order.

The motion of the NAACP Legal Defense and Educational Fund, Inc., Lucy Sledge, and Sallie Pearl Lewis for leave to file memoranda as amicus curiae in support of the Equal Employment Opportunity Commission's petition for rehearing is granted.

Upon consideration of the petitions for rehearing filed by Tobacco Workers' International Union and Local 182, the Equal Employment Opportunity Commission, and The American Tobacco Company and American Brands, Inc., and of the suggestions for a rehearing en banc;

Now, therefore, with the concurrence and approval of Judge Winter, and in the absence of a request for a poll of the entire court, as provided by Appellate Rule 35(b),

Order of the Court of Appeals Denying Petitions for Rehearing.

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Judge Widener would grant rehearing of those issues on which he has dissented.

Let the mandate issue forthwith.

JOHN D. BUTZNER, Jr.
United States Circuit Judge
A True Copy Teste

Wililam F. Slate, (Illegible)
By (ILLEGIBLE)
Deputy Clerk

FILED
APR 16 1976
U. S. Court of Appeals
Fourth Circuit

First Memorandum Opinion of the District Court.

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 101-73-R

John Patterson, et al.,
Plaintiffs,

v.

The American Tobacco Co., et al.,
Defendants.

Civil Action No. 104-73-R

Equal Employment Opportunity Commission,
Plaintiff,

v.

American Brands, Inc., et al.,
Defendants.

Memorandum Opinion.

Entered September 26, 1974

These actions, consolidated for trial, involve alleged sex and race discrimination in two plants and an administrative office of The American Tobacco Company (American) in Richmond, Virginia. Civil Action No. 101-73-R (Patterson) is brought pursuant to 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, et seq.)[1] as a private class action[2] seeking affirmative injunctive relief and back pay on the basis of past and continuing racial discrimination in employment practices, particularly with regard to seniority and job assignments resulting from the seniority.[3] Civil Action No. 104-73-R (EEOC) is also a Title VII action, but was brought by the Equal Employment Opportunity Commission (EEOC) pursuant to 42 U.S.C. § 2000e-5(f)(1). It contains allegations similar to those in Patterson with regard to employment practices and in addition alleges discrimination in hiring on the basis of race and sex discrimination. The Tobacco Workers' International Union (the International),

---

[1] The Patterson action was originally brought only pursuant to 42 U.S.C. § 1981. Following receipt of a Notice of Right to Sue from the EEOC to certain named plaintiffs, the action, on March 12, 1973, was amended to include an allegation of violation of Title VII.

[2] The class has been defined as follows:

(1) All black persons, whether currently employed or retired, who were employees of the defendant company on or after July 2, 1964; and

(2) All black persons, whether currently employed or retired, who were employees of the defendant company on or after July 2, 1965, who were performing duties in jobs, the compensation for which was less than that for similarly situated white employees.

[3] On May 10, 1974, on plaintiffs' motion, an order was entered striking from the Amended Complaint in Patterson all allegations pertaining to discrimination in hiring on the basis of race. Since the trial of the case the plaintiffs in Patterson have filed, pursuant to Fed. R. Civ. P. 15(b), a motion to amend the complaint to conform to evidence introduced at the trial on the subject of hiring on the basis of race. That subject *was* included in the complaint by the EEOC at the time of trial. Consequently, the subject, even without the amendment sought by the Patterson plaintiffs, will be considered in this opinion.

a defendant in the Patterson action, is not named in the EEOC action. Local No. 182 of the International (the Local) is named a defendant in both actions.

The case was tried to the Court beginning July 15, 1974, limited to the issues of liability for back pay and injunctive relief. The issues as to the amount, method of calculation, and distribution of any back pay award are to be considered after resolution of the issues of liability and injunctive relief. The last of the post trial briefs was received on or about August 15, 1974.

For a more complete description of the parties and certain other facts, reference is made to Stipulation Number I, attached as Appendix I, which the Court adopts as part of its findings of fact.[4]

During and after trial, defendants renewed motions previously made for dismissal and summary judgment. These will be considered before reaching the merits of plaintiffs' allegations:

A. *The EEOC Action Was Not Timely Filed.*

This issue has now been decided, adversely to defendants, by *EEOC* v. *Cleveland Mills Co.*, Civil No. 73-2298 (4th Cir., August 19, 1974).

B. *The Right Of EEOC To Sue Terminates Upon The Filing Of Patterson And Vice Versa.*

The "problem of duplicitous actions" referred to in *Cleveland Mills* is really no problem here. In the first place, when the Patterson suit was originally filed, on March 2, 1973, it was not a Title VII action; it did not become one until March 12, 1973. The EEOC action was filed

[4] Counsel for the defendant unions did not agree to Paragraphs 9, 10, 50 and 56 of the Stipulation; however, the Court finds that the statements of fact contained in those paragraphs are correct.

on March 5, 1973. Second, there are significant differences, as heretofore set forth, between the actions, the only duplication being on the issue of discrimination in promotional opportunities on the basis of race. Third, even if it were concluded that the plaintiffs in Patterson, instead of amending their complaint, should have intervened on this issue in the EEOC action, dismissal of either action would not be warranted. Here the consolidation of the actions has accomplished what intervention would have.

C. *The EEOC Has No Standing To Represent Females.*

American's position on standing, in essence, is that EEOC can only have that standing which the charging party, in this case Jenkins, would have had if he had brought a private action. Jenkins, a male, filed a charge with the EEOC alleging discrimination against males because of sex. EEOC in its complaint here charges discrimination against females because of sex. American says that because Jenkins could not bring a private action based on discrimination against females, neither can the EEOC. The Court does not agree. Such restriction on the adjudication of all the aspects of an issue such as sex discrimination runs counter to the liberal construction to which Title VII is entitled. This case is distinguishable from the cases which hold that where the charging party alleged only race discrimination before the EEOC, the EEOC cannot file a complaint alleging sex discrimination, although there is language in some of those cases which supports defendants' position.[5] It would be inconsistent with the remedial aims of Title VII

[5] *EEOC* v. *New York Times Broadcasting Services, Inc.*, 364 F. Supp. 651 (W.D. Tenn. 1973); *King* v. *Georgia Power Co.*, 295 F. Supp. 943 (N.D. Ga. 1968); *EEOC* v. *W. Elec. Co.*, Civil No. 73-448-N (D. Md., August 15, 1974). Contra: *Latino* v. *Rainbo Bakers, Inc.*, 358 F. Supp. 870 (D. Cal. 1975).

to hold that once the issue of sex discrimination had been presented to the Commission, the Commission could only investigate discrimination against persons of the same gender as the person who made the charge. A proper investigation of that issue would almost necessarily involve inquiry into whether either sex was being discriminated against. Discovery of such discrimination without the ability to seek to alleviate it in accordance with 42 U.S.C. § 2000e-5(f)(1) would subvert the purpose of that provision. Certainly discrimination against both sexes was within "the scope of the EEOC investigation which can be reasonably expected to grow out of the charge of discrimination." *Sanchez* v. *Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970).

D. *All Claims Are Barred By The Virginia Statute of Limitations, Va. Code Ann. § 8-24.*

The cited Virginia statute does not mention 42 U.S.C. § 1981. It does mention 42 U.S.C. § 1983. Actions under the latter, according to the Virginia statute, must be brought within one year. Actions for back pay, such as the instant one, would clearly survive, and were this action solely for redress under § 1981, damages for back pay accruing prior to five years before the action was filed might not be recoverable. Under 42 U.S.C. § 2000e-5(g), however, back pay is allowable as an affirmative action if found appropriate to correct an unlawful employment practice. The liability for back pay under Title VII is limited to a period beginning two years prior to the filing of a charge with the Commission. 42 U.S.C. § 2000e-5(g). The charges were filed by the named plaintiffs in Patterson in January and February of 1969. The charge with respect to sex discrimination was filed with the EEOC on April 8, 1969. Although back pay would not be allowable earlier than two years prior to those dates, it would be allowed, if appropriate, from that date forward.

If, as alleged, the violations are continuing in nature, there would be no statutory limitation bar to injunctive relief.

E. *The EEOC Action Should Be Dismissed As To The Local Union For Failure To Give The Union The Opportunity To Conciliate.*

Under the circumstances of this case, failure to offer formally the union an opportunity to conciliate prior to the filing of the law action, while perhaps technically a defect, is not a basis for dismissal of the action as to the union. On July 9, 1973, an offer to conciliate was formally made, *and accepted* on July 12, 1973 by the union. While unsuccessful, the efforts at conciliation were sufficient to meet the requirements of the act and to constitute substantial compliance therewith.

F. *None Of The Violations Is Of A Continuing Nature.*

As hereafter pointed out, while the present system of posting and bidding, employed by American since 1968, is facially fair and neutral; past acts of discrimination have resulted in present disparity of pay, present segregated job classifications and present promotional systems based on race and sex. These constitute, in the Court's view, continuing violations of Title VII.

• • • •

The Court makes the findings of fact attached hereto as Appendix II, many of which as counsel will recognize, are adopted from portions of the proposed findings of fact submitted by the parties.

The facts listed are found with the full realization that statistics are often misleading; that certain of the plaintiffs'

exhibits containing statistics do not support the conlcusions [*sic*] attempted to be drawn from them by the plaintiffs; that the same is true for the defendants and some of their exhibits; and that on an individual basis some of the exhibits are in fact incorrect. The inference which the Court draws from the statistics overall, however, is that, except for the non-supervisory employees in the Richmond Office, there was and is disparate income by race and sex, segregated job classifications by race and sex, and promotional systems based on race and sex. Neither the statistics nor the other evidence of the plaintiffs warrant such an inference with regard to non-supervisory employees at the Richmond Office; however, supervisory positions at all three facilities have been practically closed to blacks and females until very recently.

The omission of any finding with regard to whether a particular job classification is underevaluated is deliberate. Aside from the fact that the experts on both sides and their respective graphs (Pl's Ex. 48 and Deft's Ex. VB-22) were not particularly persuasive, the Court seriously questions the propriety of its determining whether a particular job is underevaluated or underpaid in actions such as these.

Likewise the failure to make any findings with regard to the filling of temporary vacancies is purposeful. The manner of filling such vacancies is complicated, and the present effect of past or present practices in that regard is too speculative to warrant the Court's making any finding that those practices have resulted in discrimination on account of race or sex.

The present system of posting and bidding adopted in 1968 is fair, although it needs, in the Court's view, further implementation. As indicated in the findings of fact, however, black and female employees in the Richmond Branch and the Virginia Branch have been locked in their jobs as a result of prior discriminatory practices. This is because of the static condition of the tobacco industry gen-

erally, and American in particular, and the advent of automation, both of which have limited opportunities for upward movement of present employees and for new hiring.

Even without specific proof of overt or particular acts of discrimination,[6] the statistical evidence is more than sufficient to establish a *prima facie* case of discrimination for the two branches. Under now familiar principles, the burden of rebutting such a case or of showing that the discrimination is caused by business necessity accordingly shifts to the defendants. *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir. 1972). The defendants have failed to carry this burden. American takes the position that there is no discrimination and hence, with few exceptions, does not undertake to show any business necessity. Their statistics, their testimony that better jobs were available to the blacks and females who wanted them, and their evidence of efforts to eliminate any discrimination at the two branches are unpersuasive. The situation with regard to supervisory positions at all three facilities is particularly deplorable.

Hiring

The same cannot be said of hiring, however, except to the extent that discrimination in the selection of supervisory personnel can be considered discrimination in hiring (and the Court does not so consider it, since such a substantial portion of the supervisory personnel is selected from the hourly-paid workers). In the Court's view, not only do the plaintiffs' statistics and other evidence not warrant an inference of discrimination insofar as hiring is con-

---

[6] Even if the named plaintiffs cannot show individual injury from discrimination, this, of course, does not deprive of a remedy the class of employees which the named plaintiffs represent. *Parham* v. *S.W. Bell Tel. Co.*, 433 F. 2d 421, 428 (8th Cir. 1970).

cerned, but the statistics offered by the defendants and their evidence of affirmative efforts with regard to hiring rebut any *prima facie* showing made by the plaintiffs in this regard.[7]

Crafts

Nor are the plaintiffs entitled to relief with respect to the craft positions. The statistics reveal an unfortunate situation, to say the least, in craft positions for both blacks and females. The defendants' evidence, however, convinces the Court that, quite aside from any mechanical difficulty arising from the absence of the craft unions as parties, the absence of blacks and females is not the result of discrimination by American. Among the factors leading the Court to this finding are the relatively small number of craft positions existing in the plants, the small turnover in those positions, the scarcity of qualified craftsmen in the Richmond SMSA, the fact that recruiting for qualified persons has been conducted in a non-discriminatory way, and the efforts that have in fact been made to recruit blacks for those positions.

Union Involvement

Both the Local and the International disclaim any involvement in creating or fostering impermissible conditions at American. Although wages are paid only by American, the local has been active in the fixing of wages, working conditions, and factors to be considered for promotions. Consequently it is "responsible," even if not solely, within

[7] This resolution of the hiring issue makes it unnecessary to decide the Patterson plaintiffs' motion to amend, discussed in Paragraph 2, *supra*. The Court's finding would be the same, however, even were the motion granted.

the meaning of 42 U.S.C. § 2000e-5(g) for the unlawful employment practices. Moreover, the mandatory injunctive relief the Court intends to grant, involving possible changes in employee job positions and seniority contrary to terms of the existing contract between American and the union, requires that the Local be bound by any decree entered in the actions.

The International's disclaimer of involvement is refuted by the terms of the constitution of the Local which recites, in pertinent part:

> ". . . no collective bargaining and working agreements shall be consummated until first submitted to the General President [of the International] who may . . . approve or reject any proposed agreement and no such agreement can be executed without the approval of the General President. . . ."

Plaintiffs' Ex. 53.

By its terms that Constitution constitutes a contract between the Local and the Internaional unions. It, too, is responsible for the unlawful employment practices.

• • •

The Court concludes from the attached Stipulation and findings of fact and the foregoing that plaintiffs are entitled to the following relief:

A. An award of back pay, in favor of the hourly-paid blacks at the Richmond Branch and the Virginia Branch who are members of the class, as defined, and who have not "opted out," against American and the unions.

B. An award of back pay, in favor of the hourly-paid females in the Virginia Branch and the Richmond Branch, whether currently employed or retired, who were employees of American on or after July 2, 1965, and who were per-

forming duties in jobs, the compensation for which was less than that for similarly situated male employees, against American and the unions.

C. An adjustment to the pension and profit-sharing plans to compensate for the effects of past discrimination.

D. An award of costs, including attorneys' fees to counsel for the plaintiff in Patterson.

E. An injunction providing:

1. A company-wide (i.e., Richmond Branch and Virginia Branch) seniority system for employees other than supervisory personnel.

2. An immediate company-wide posting and bidding on each non-supervisory job in the Richmond Branch and Virginia Branch, with no qualification except seniority and a willingness to learn the job; provided, that as to the jobs of adjuster, overhaul adjuster, and adjuster-prefabrication, the qualifications listed in finding 31 shall also be required. The existing posting and bidding procedure shall be followed; but in addition there shall be promulgated and posted a job description of each job classification posted. A reasonable time will be allowed to accomplish the foregoing. In the event, after that reasonable time, class members or females are found to have displaced an incumbent employee who has had to move to a job having a lower classification, such employee will have his or her wages "red-circled" until the wage level for the job he or she holds reaches the level at which he or she is being paid.

3. Insofar as supervisory personnel are concerned, in the Richmond Office, Richmond Branch and Virginia Branch, no vacancies therein shall be filled with other than females and blacks until the percentages of females and blacks in supervisory positions approximates [*sic*] the

percentages of females and blacks in the total work force in the Richmond SMSA.

4. A written job description for supervisory jobs which will include, but should not be limited to, objective criteria for selection for or promotion to a supervisory position.

* * *

In formulating the above relief, the Court does not intend to mandate the awarding of a job to a person who is not qualified for it. Following a reasonable time, if an employee, whether supervisory, clerical, or factory worker, is unable to competently perform the job, he or she need not be retained in that job. This decision is to remain the employer's, and will not be disturbed absent a showing of discrimination.

The "bumping," which can occur under the relief awarded, will undoubtedly create morale problems, if not immediate economic problems, for those displaced. The relief is warranted, however, where past discrimination has allowed those persons greater job opportunity than more senior blacks and females.

The formulation of the method of calculation and distribution of the back pay award and adjustment to the pension and profit-sharing plans will be complex—sufficiently so as to tax the ingenuity and good faith of counsel. In this regard counsel are directed to confer with a view to agreeing on a plan of calculation and distribution of the back pay award for submission to the Court—and, indeed, to explore the possibility of settling the monetary aspects of the case.

A decree should be prepared embodying, in more detail, the injunctive relief awarded, and providing for a method of calculation and distribution of the back pay award as well as adjustments to the pension and profit-sharing plans. If the latter cannot be agreed upon after thirty (30) days,

counsel should notify the Court and a hearing will be scheduled. If the form of the decree, insofar as injunctive relief is concerned, cannot be agreed upon within a reasonable time, counsel should also notify the Court, and a hearing on that, perhaps combined with the other hearing, may be scheduled.

/s/ G. V. B., J.
United States District Judge

Alexandria, Virginia
September 25th, 1974.

APPENDIX I

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 101-73-R

John Patterson, Marion Moshoe, Edmund Page, James Randolph, Percy Taylor, each individually and on behalf of all other persons similarly situated,

Plaintiffs,

v.

The American Tobacco Company, a Division of American Brands, Inc., a corporation; Tobacco Workers International Union, an unincorporated association; Local 182, Tobacco Workers International Union, an unincorporated association,

Defendants,

and

Civil Action No. 104-73-R

Equal Employment Opportunity Commission,

Plaintiff,

v.

American Brands, Inc., d/b/a The American Tobacco Company; and Local 182, Tobacco Workers International Union (AFL-CIO),

Defendants.

STIPULATION NUMBER I

The plaintiffs, John Patterson, et al., and the Equal Employment Opportunity Commission, and, the defendants, The American Tobacco Company, Local 182, Tobacco Workers' International Union, and the Tobacco Workers' International Union, do hereby stipulate and agree, subject to objection by any party as to the relevancy, competency, and materiality, of any statement contained herein and without in any way abridging the right of any party hereto to introduce additional evidence relating to any of the matters herein, as follows:

1. The defendant The American Tobacco Company, a division of American Brands, Inc., (hereinafter Company) is a corporation organized and existing under the laws of the State of New Jersey.

2. The defendant Company is an employer in an industry affecting commerce within the meaning of § 701(b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b).

3. The defendant Company owns and operates the Virginia Branch for the purpose of manufacturing cigarettes in Richmond, Virginia.

4. The defendant Company owns and operates the Richmond Branch for the purpose of manufacturing smoking (pipe) tobacco in Richmond, Virginia.

5. Although the Virginia Branch and the Richmond Branch are under separate plant management, the defendant Company has on two occasions, the last occasion being between the years 1957-1959, permanently transferred employees from one Branch to the other.

6. An office staff which performs various accounting and record keeping duties for both the Richmond and Virginia Branches, is physically located at the Virginia Branch, and is designated as the Richmond Office.

7. The Shipping Department at the Virginia Branch ships the products of the Virginia and Richmond Branches.

8. The defendant Company does not maintain any written job descriptions for any of its job classifications at the Richmond and Virginia Branches.

9. Local No. 666 of The International Brotherhood of Electrical Workers (I.B.E.W.) has jurisdiction over the job classifications of electrician and electrician's helper at the Richmond and Virginia Branches of the defendant Company.

10. Richmond Lodge No. 10 of The International Association of Machinists and Aerospace Workers' (I.A.M.A.W.) has jurisdiction over the job classifications of machinists, machinist apprentice, welder, carpenter-millwright, brick or cement work, pipefitters, adjuster—prefabrication (Virginia Branch), adjuster helper—prefabrication (Virginia Branch), conveyor adjuster (Virginia Branch), and helper at the Richmond and Virginia Branches of the defendant Company.

11. All of the other job classifications for hourly employees, which are not under the jurisdiction of the I.B.E.W. or the I.A.M.A.W. Unions, are under the jurisdiction of Local 182 of the Tobacco Workers' International Union (T.W.I.U.).

12. From 1953 to the present, the defendant Company has had federal government contracts for the sale of some of its products.

13. The Company's first Equal Employment Opportunity program was drawn up in 1956, and the second pro-

gram was drawn up in 1962. (A copy of these programs is attached hereto as Exhibits A and B respectively.)

14. Beginning in 1956 the defendant Company conducted a program of plant modernization in the Prefabrication Department of the Virginia Branch which included the phase out of old machines and techniques and the initiation of new automated processes. As the result of this program, sixteen black employees were transferred to the Fabrication Department and six were sent to the Richmond Branch between 1956 and 1958.

15. The Virginia Branch of the defendant Company is divided into two major departments—Prefabrication and Fabrication.

16. The Prefabrication Department at the Virginia Branch of the defendant Company is subdivided into the Turkish, Casing, and Cutting Departments.

17. The Fabrication Department at the Virginia Branch of the defendant Company is subdivided into the Making, Packing, Shipping, and Receiving Departments.

18. The Richmond Branch of the defendant Company is divided into two major departments—Prefabrication and Fabrication.

19. The Prefabrication Department at the Richmond Branch is subdivided into the Cooking, Dipping and Drying, Long Cut, Blended Stock, High Grade, Guardite, Stem Rolling, and Shipping and Receiving Departments.

20. The Fabrication Department at the Richmond Branch contains only the Packing Department.

21. Both the Richmond and Virginia Branches of the defendant Company have a Mechanical, Medical, and Clerical Staff.

22. Prior to September 16, 1963, the Company recognized two locals of the T.W.I.U. at the Richmond and Virginia Branches of the defendant Company. One of these Locals, No. 216, had an all black membership and had jurisdiction over job classifications located primarily in the Prefabrication Department of the Richmond and Virginia Branches of the defendant Company. The other T.W.I.U. Local, No. 182, had an all white membership and had jurisdiction over only those job classifications located in the Fabrication Department of the Richmond and Virginia Branches of the defendant Company.

23. Executive Order No. 10925, which was issued by President Kennedy and became effective on March 6, 1961, detailed specific penalties for a government contractor in noncompliance with federal requirements for equal employment opportunity.

24. Approximately 81% of the hourly paid workers in the Prefabrication Department of the Virginia Branch are black. None of the adjusters-prefabrication have ever been black.

25. At the present time, 2 of the 3 adjuster helpers—prefabrication at the Virginia Branch are black.

26. In order to become an adjuster—prefabrication, an employee must first serve as an adjuster helper—prefabrication.

27. In order to become an adjuster learner in the Fabrication Department of the Virginia Branch, it is necessary that an employee be a packing, Schmermund or making machine operator. Only packing and Schmermund machine operators are eligible to become adjuster learner-packers, and only making machine operators are eligible to become adjuster learner-makers.

28. The labor rates for hourly employees and for all job classifications at both the Richmond and Virginia Branches under the jurisdiction of Local 182 and former Local 216 of the Tobacco Workers' International Union have been negotiated for every contract period since 1937.

29. John Patterson was initially employed by the defendant Company as a tobacco tub handler at the Virginia Branch on April 4, 1946.

30. Percy Taylor was initially employed by the defendant Company as a laborer in the Prefabrication Department at the Virginia Branch on May 12, 1941 and was reemployed on September 19, 1944 after quitting on May 5, 1944.

31. James Randolph was initially employed by the defendant Company as a laborer in the Prefabrication Department of the Virginia Branch on September 23, 1952.

32. Marion Moshoe was initially employed by the defendant Company at the Richmond Branch as a laborer in the Prefabrication Department on February 3, 1958.

33. Edmund Page was initially employed by the defendant Company as a laborer in the Prefabrication Department of the Richmond Branch on August 20, 1948.

34. All of the named plaintiffs joined Local 216, T.W.I.U. after being hired by the defendant Company.

35. None of the named plaintiffs became members of the defendant Local 182 until September 16, 1963.

36. All of the named plaintiffs have been members of the defendant Local 182 since September 16, 1963, and are currently members of that Local.

37. The named plaintiffs are blacks who are currently employed as hourly production workers by the defendant Company at either the Richmond Branch or the Virginia Branch, and are members of the defendant Local 182 of the Tobacco Workers' International Union.

38. On January 15, 1968 the defendant Company instituted a system (which is still in effect) whereby permanent vacancies in classifications under the jurisdiction of Local 182 of the T.W.I.U. at both the Richmond and Virginia Branches were filled through job posting and employee bidding. Under this system, all such vacancies are posted on plant bulletin boards for seven working days. Anyone in the bargaining unit may sign any posting (bid on any job) with the exception of postings for vacancies in the adjuster, learner adjuster, examiner-making, examiner-packing, adt dryer operator, textile dryer operator, overhaul adjuster-making or packing, and turbine operators classifications at the Virginia Branch and adjuster and learner adjuster at the Richmond Branch.

39. Only employees who have become learner adjusters are eligible to move into vacancies in the adjuster classification.

40. Only employees who are experienced as a packing or making machine operator or Schmermund boxer operator are eligible to bid on vacancies in the learner adjuster classification.

41. Only employees who are experienced as a catcher are eligible to bid on vacancies in the examiner-making classification.

42. Only employees who are experienced as line searchers-Schmermund boxer are eligible to bid on vacancies in the examiner-packing classification.

43. Only those employees who have become an assistant adt dryer operator are eligible to move into vacancies in the adt dryer operator classification.

44. Only those employees who have become an assistant textile dryer operator are eligible to move into vacancies in the textile dryer operator classification.

45. Only those employees who have become a making or packing adjuster are eligible to move to vacancies in the overhaul adjuster classification.

46. Only those employees who have become an adjuster helper-prefabrication are eligible to move to the adjuster-prefabrication classification.

47. Only those employees who have become boiler operators are eligible to move into vacancies in the turbine operator classification.

48. The only formal or procedural requirement for an employee's bidding on a job, except those noted in #38, is for the employee to sign the posting in any location where it is displayed. When the posting is removed from the bulletin boards at the end of the seven working days, the plant seniority dates of all persons signing are compared and the most senior signer is given the first opportunity to learn the job.

49. As a general rule, since September 16, 1963, employees within the Local 182 of the T.W.I.U. bargaining unit are given preference for any vacancies in job classifications within the bargaining unit, and hiring is performed only for entry level jobs unless all of the employees refuse to accept a vacancy.

50. None of the job classifications under the jurisdiction of the I.B.E.W. or the I.A.M.A.W. Unions are subject to the posting and bidding system of filling permanent vacancies.

51. Under the posting and bidding procedure, once an employee has bid on and been awarded a permanent position, he/she enters into on-the-job-training wherein experienced employees who are already classified in a particular position instruct the employee new to the position as to the duties and responsibilities of the position.

52. If any employee decides within fourteen days after beginning his training period that he/she does not wish to accept the position, that employee can "sign off" the job and return to his/her former position.

53. If an employee decides after being assigned to a position for over fourteen days that he does not wish to accept that position, he may not "sign off" the job. However, he may sign another posting and, if he is successful, thereby remove himself from the first position.

54. There are no established limits on the length of time during which an employee may receive on-the-job training for any job classification at either the Richmond or Virginia Branch of the defendant Company.

55. The superintendent has the discretion to remove a trainee when in his opinion, after a reasonable period of time, that employee has not demonstrated that he can perform that particular job.

56. Prior to selecting an employee for promotion to a supervisory position, the defendant Company gives the local union an opportunity to make recommendations.

57. The defendant Company has never had an educational requirement for employees promoted from hourly production jobs to supervisory positions.

58. Hourly employees of the defendant Company do not have to apply or express their interest in holding a supervisory position in order to be considered for promotion to such a position.

59. The defendant Company does not have any written guidelines which are used in selecting supervisory personnel.

60. The selection of supervisors at the Richmond and Virginia Branches of the defendant Company is left to the discretion of those employees at the superintendent and manager levels of plant management.

Stipulated and agreed to this 24th day of June, 1974.

/s/ Henry L. Marsh, III
Counsel for Plaintiffs John Patterson et al.

/s/ C. Daniel Karnes
Counsel for Plaintiff EEOC

/s/ Henry T. Wickham
Counsel for Defendant Company

/s/ Jay J. Levitt
Counsel for Defendant Unions

Union Counsel does not stipulate to Nos. 9, 10, 50 and 56 for lack of sufficient information and reserves right to correct any other stips. mistakenly entered into.

/s/ J J L

Exhibit A

Equal Job Opportunity

The following points were agreed to at the meeting held April 24, 1956, and constitute a plan of equal job opportunity in the manufacturing departments of the Company, in accordance with the clause in government contracts:

How many employees will be affected?
This was answered by saying that management would select the employees, as always there are employees who do not qualify for the new job and the individual employee has the right to refuse and stay on the job where he is satisfied.

Seniority status of employees moved to new jobs?
Employees given the opportunity to move in a new classification will advance in order of placement, and move backwards in reverse order, and, if necessary, return to the job from whence they came.

The jurisdiction?
The local that has jurisdiction and is bargaining for a particular classification will continue to hold jurisdiction and bargain for all employees in the classification, regardless of color or affiliation.

Racial problems?
If a problem of a racial nature becomes a grievance, the shop committee of both local unions will meet and agree on the unions' position, which will be presented to management for settlement in accordance with the grievance clause (Article 13) in the contract.

Employment?
New employees will be hired as to races on the basis of the approximate census in the plant area. This will be followed if applicants qualify for the job and are available when called.

Exhibit B

Equal Job Opportunity

There is equal job opportunity in accordance with the clause in government contracts. The following points represent the understanding of the Company and the Unions with respect to employees to whom the government contract clause is applicable and who are represented by the Unions:

Selection for New Jobs

Management will continue to select employees for new jobs on the basis of their qualifications and to recognize the right of an employee to refuse a new job and stay on the job where he is satisfied.

Seniority Status of Employees Moved to New Jobs

Employees given the opportunity to move in a new classification will advance in order of placement, and move backwards in reverse order, and, if necessary, return to the job from whence they came.

The Jurisdiction

The local that has jurisdiction and is bargaining for a particular classification will continue to hold jurisdiction and bargain for all employees in the classification, regardless of affiliation.

Grievances Where Locals Disagree

If a problem on which two locals disagree becomes a grievance, the shop committee of both local unions will meet and agree on the unions' position, which will be presented to management for settlement in accordance with the Grievance Clause in the Union Contract.

Employment

The Company is an equal opportunity employer and, as such, will provide equal employment opportunities without regard to race, color, creed or national origin.

APPENDIX II

A. *Facts Relevant To The Issues Of Both Sex And Race Discrimination:*

1. American's facilities are located in the Richmond Standard Metropolitan Statistical Area (SMSA) which includes the City of Richmond and the counties of Henrico, Hanover and Chesterfield.

2. The 1960 census, which did not include Hanover County, shows:

Richmond SMSA Population	408,494	
Black Population	107,366	26%
Female Population	227,650	55%

3. The 1970 census, which included all the political subdivisions in the Richmond SMSA, shows:

Richmond SMSA Population	518,319	
Black Population	130,241	25%
Female Population	272,803	52%

4. The 1970-1973 Virginia Employment Commission estimate of the percent of the total work force which is comprised of blacks and females in the Richmond SMSA is as follows:

Minority (Black)	23.6% of the Total Work Force
Female	41.0% of the Total Work Force

5. The Richmond Office is located within the Virginia Branch. The Virginia Branch and the Richmond Branch, despite difference in street addresses,[1] are physically

[1] The addresses of the Virginia Branch and the Richmond Branch, respectively, are 26th and Cary Streets and 21st and Grace Streets, Richmond, Virginia. A map, not to scale, showing the relative positions of the two plants, is attached as Appendix III.

located very near one another. The presently practiced plant-wide seniority system, i.e., seniority determined within each of the three facilities, has, except with respect to the Richmond Office, contributed to the perpetuation of the discrimination found in finding 33 and 81. It has not been shown to be justified by any business necessity.

6. No new employees were hired to fill job classifications under the jurisdiction of the Tobacco Workers' International Union at the Virginia Branch from September 12, 1955 through May 12, 1966, nor at the Richmond Branch from September 12, 1955 through June 12, 1964.

7. Between September 16, 1963, and January 15, 1968, employees at the Virginia Branch were canvassed to determine if they were interested in procuring a position in a given job classification should a vacancy later occur.

8. Job "qualifications," as used between September 16, 1963, and January 15, 1968, were never reduced to writing. Employees learned of the specific "qualifications" either by talking to supervisory personnel or representatives of the union, or, by observing the system of promotion in operation. "Qualified," as used for this period, referred to whether or not an employee had filled a particular job before and was, in the opinion of supervisory personnel, familiar with it.

9. Employees who are permanently classified in jobs which are located in the Prefabrication Department of either branch of American generally fill temporary vacancies within the Prefabrication Department. Employees who are permanently classified in jobs which are located in the Fabrication Department of either branch of the defendant company generally fill temporary vacancies within the Fabrication Department.

10. Local 182 and the Tobacco Workers' International Union entered into collective bargaining agreements, governing, *inter alia,* wage rates for employees under its jurisdiction, which became effective in 1954, 1956, 1958, 1960, 1962, 1965, 1968, 1971 and 1974, respectively. The unions have jurisdiction over employees at the Richmond Branch and the Virginia Branch, but not the Richmond Office.

11. Supervisory personnel at the Virginia and Richmond Branches of American include the job classifications of assistant foreman, foreman, assistant superintendent, superintendent, assistant manager and manager.

12. Supervisory personnel at the Richmond and Virginia Branches of American have traditionally been either promoted from the ranks of the hourly employees, hired as new employees or transferred from other branches. Since 1960, 34% of the vacancies at the assistant foreman level have been filled by promoting former hourly employees of American.

13. Prior to selecting an employee for promotion to a supervisory position, American gives the local union an opportunity to make recommendations.

14. When the union and American's recommendation are [*sic*] not the same as to who should be promoted to a supervisory position, American's branch manager makes the final decision.

15. The defendant company has never had an educational requirement for employees promoted to supervisory positions from hourly production classifications.

16. Since July 1, 1965, at least eighteen employees have been hired for or promoted to the position of assistant foreman at the Virginia Branch.

17. Since July 1, 1965, at least nine employees have been hired for or promoted to the position of assistant foreman at the Richmond Branch.

18. Hourly employees of American do not have to apply for or express an interest in a supervisory position in order to be considered for promotion to such a position.

19. American does not have any written guidelines or objective standards which are used in selecting supervisory personnel.

20. Craft positions at the Virginia Branch include the job classifications of "machinist, machinist apprentice, electrician, electrician's helper, welder, carpenter-millwright, brick or cement worker, helper and pipefitter."

21. Craft positions at the Richmond Branch include the job classifications of machinist, machinist's helper, electrician, pipefitter, and carpenter.

22. Until 1971, American required that all applicants who are being considered for positions as clerks in the Richmond Office take the Minnesota Clerical Test. This test has never been certified as being either job related or predictive of job performance.

23. American has had a retirement plan for all of its employees at the Richmond and Virginia Branches since before 1942, and a profit-sharing plan since 1960.

24. An employee's share in profit-sharing and his benefits under the present retirement plan depend on yearly gross earnings.

25. Total employment[2] at the Virginia Branch declined

[2] The findings with regard to employment by American are broken down into figures and percentages for the Virginia Branch,

(*footnote continued on following page*)

from 2,157 in 1953 to 1,027 in 1974. Factory workers declined from 1,476 in 1962 to 829 in 1974. Factory workers hired subsequent to May 16, 1966, were all hired into entry-level jobs and were not hired for any particular vacancy. There are no records to indicate the race of applicants from 1955 to February, 1972.

26. Total employment at the Richmond Branch declined from 399 in 1953 to 218 in 1973. Factory workers declined from 227 in 1962 to 156 in 1973. There are no records to indicate the race of applicants prior to March, 1972.

27. In 1961, the Richmond Office had 59 employees, excluding supervisors; in 1969 there were 69 such employees; and, on February 28, 1974, there were 55 such employees.

28. From January 1, 1963, to June 1, 1973, there have been over 55 vacancies in the assistant foreman position at the Virginia Branch.

29. From January 1, 1963 to June 1, 1973, there have been over 30 vacancies in the assistant foreman position at the Richmond Branch.

30. Since 1966, there have been 4 vacancies in the postion of supervisor in the Richmond Office.

31. The so-called "lines of progression" described in Paragraphs 38 through 47 of Stipulation I (Appendix I), with the exception of the requirements described in Paragraph 39 (learner adjuster in order to become an adjuster), Paragraph 45 (making or packing adjuster in order to become an overhaul adjuster) and Paragraph 46

(*footnote continued from preceding page*)

the Richmond Branch and the Richmond Office. Because the Court finds that these three offices should be combined and considered as being at one location, the toatal [*sic*] figures have been considered for the purpose of the Court's ultimate findings.

(adjuster helper-prefabrication in order to become an adjuster-prefabrication) are not justified by any business necessity. The lines of progression other than these three have perpetuated past discrimination on the basis of sex and race.

B. *Facts Relevant To The Issue of Race Discrimination:*

32. Prior to September 16, 1963, American discriminated on the basis of race with respect to facilities, union representation, wage structure, departments, seniority lines and hiring.

33. As a result of the low number of posted permanent vacancies at the Virginia and Richmond Branches, most black employees have been unable to move into the higher paying job classifications which had previously been restricted to whites. Consequently, a pattern of racially segregated job classifications and departments still exists in spite of American's adoption of a posting and bidding system.

34. Many of the positions in the job classification which were previously restricted to whites are now held by white employees, with less seniority than black employees, who were able to obtain these positions prior to 1968 by virtue of American's use of a racially discriminatory promotion system of plant seniority "plus qualifications," or by virtue of American's initial assignment of whites directly into these positions.

35. Black employees have received lesser amounts than white employees with comparable seniority under American's profit-sharing and retirement plans because of American's disparate wage structure and the inability of blacks to gain access to higher paying jobs.

36. Local 182 and The Tobacco Workers' International Union have negotiated and entered into labor agreements

which have determined working conditions, wage rates, employee benefits and conditions for promotion. These have had the effect of continuing blacks in the lower paying, less desirable jobs at the Richmond and Virginia Branches.

37. Prior to 1963, black employees of American did not fill any temporary vacancies in job classifications which were restricted to whites. During that same period, white employees did not fill any temporary vacancies in job classifications which were restricted to blacks.

38. Prior to September 16, 1963, the Miscellaneous Department at the Virginia Branch contained two job classifications, "cleaner" and "elevator operator." All of the employees holding these classifications in this department were black. During this period, these employees were responsible for manual materials handling, by-products removal from the production floors, and cleaning the fabrication cafeteria eating area and two fabrication rest rooms.

39. For the years 1965 through 1973, black hourly-paid production workers at the Virginia Branch generally had a lower mean income than whites with equivalent plant seniority.

40. For the years 1965 through 1973, black hourly-paid production workers at the Richmond Branch generally had a lower mean income than whites with equivalent plant seniority.

41. Jobs in the Prefabrication Department of the Richmond Branch historically have had lower wage rates than jobs in the Fabrication Department of that Branch.

42. Jobs in the Prefabrication Department of the Virginia Branch have generally had lower wage rates than jobs in the Fabrication Department of that Branch.

43. Traditionally at both branches there have been more blacks in the Prefabrication Department than whites, and more whites in the Fabrication Department than blacks.

44. Jobs at the Richmond Branch have traditionally had lower wage rates than jobs at the Virginia Branch.

45. The job classification of "operator-guardite" has traditionally had the highest wage rate of any job in the Prefabrication Department of the Richmond Branch. When this classification was first introduced, the defendant company transferred two white males from the Fabrication Department, one to operate a guardite machine and the other to serve as supervisor in the guardite operation in the Prefabrication Department. All of the other employees in the guardite operation were black. There has, however, only been one guardite machine operator, a white male, who has held the job since its inception.

46.[3] As of February 26, 1963, 196 or 11.8% of the 1,653 employees at the Virginia Branch of the defendant company were black. As of January 15, 1963, of the approximate 100 supervisors none was black.

47. The first black supervisor at the Virginia Branch was promoted from the ranks of the hourly employees by American on January 16, 1963.

48. As of May 16, 1969, of the 71 employees in supervisory positions at the Virginia Branch of American, 3 were black.

49. As of April 16, 1973, 165, or 15.49% of the 1,071 employees at the Virginia Branch of the defendant company were black. As of April 16, 1973, 5 or 7.24% of the 69 employees in supervisory positions at the Virginia Branch were black.

[3] The percentages in this and subsequent findings, namely, 46 49, 52, 54 and 55, while apparently in some instance inconsistent with the finding in Paragraphs 70, 71, 72 and 73, cover years not covered by the latter and include all employees as opposed to just factory workers.

50. As of January 1, 1974, there were 6 black supervisors at the Virginia Branch.

51. The first black supervisor at the Richmond Branch was promoted from the ranks of the hourly employees on June 1, 1966, and was assigned to the Prefabrication Department.

52. As of April 17, 1967, 79 or 32.1% of the 246 employees at the Richmond Branch were black.

53. The second black supervisor at the Richmond Branch was promoted from the ranks of the hourly employees on February 1, 1971.

54. As of March 10, 1971, 82 or 36.7% of the 223 employees at the Richmond Branch were black. On that same date 2 or 6.6% of the 30 employees in supervisory positions at the Richmond Branch were black.

55. As of April 16, 1973, 85 or 40.67% of the 209 employees at the Richmond Branch were black.

56. As of June 1, 1973, 3 or 9.6% of the 31 employees in supervisory positions at the Richmond Branch were black.

57. As of April 15, 1973, 250 or 19.53% of the 1,280 employees at both Branches of American were black.

58. Only one black has ever held any of the positions of machinist, machinists [*sic*] helper, electrician, pipefitter or carpenter at the Richmond Branch.

59. None of the employees who completed their apprenticeships at the Virginia Branch was black.

60. One of the employees who completed his apprenticeship at the Richmond Branch was black. This employee,

Mr. Frank Schools, is the only black ever employed in a craft position at the Richmond Branch.

61. Only three blacks have ever been employed as craftsmen at the Virginia Branch.

62. As of April 12, 1974, 62 persons were employed in the Richmond Office, 13 of whom were black. The total work force is made up [of] 55 clerical employees, 6 supervisory employees, and 1 office manager. All of the black employees were classified as clerks.

The positions of office manager, assistant office manager, and supervisor in the Richmond Office have never been held by a black.

63. Although John Patterson was initially assigned to the Fabrication Department of the Virginia Branch on April 4, 1946, he could not be classified in most of the job classifications in that department until September 16, 1963, because he was black.

64. Percy Taylor and James Randolph were not eligible to hold most of the job classifications in the Fabrication Department of the Virginia Branch, including those of "Packing or Making Machine Operators," until September 16, 1963, because they were black.

65. During the period from 1954 to 1971, American sometimes assigned Marion Moshoe, a black and a named plaintiff, to various machines in the Prefabrication Department as an operator. While performing these assignments, he would be paid at the lower laborer wage rate.

66. From 1960 to the present time, Edmund Page, a black and a named plaintiff, has been classified as an "operator-prefabrication and other equipment." Employees in this classification may operate as many as eight different machines. All of the employees in this classification are paid the same wage rate.

67. All of the named plaintiffs in Patterson joined Local 216, T.W.I.U., after being hired by the defendant company.

68. None of the named plaintiffs in Patterson or members of the class they represent was eligible for membership in Local 182 until September 16, 1963, because they were black.

69. All of the named plaintiffs in Patterson have been members of Local 182 since September 16, 1963, and are currently members of that Local.

70.[4] Although there are no statistics with respect to any applicants before 1972, the evidence reveals that of those persons hired into factory positions at the Virginia Branch, from 1966, when hiring began, through 1973, 152 were black and 69 were white. A breakdown of these is as follows:

	White	Black
1966	14 (32%)	30 (68%)
1967	5 (24%)	16 (76%)
1968	14 (36%)	25 (64%)
1969	5 (45%)	6 (55%)
1970	7 (35%)	13 (65%)
1971	None	None
1972	1 (06%)	17 (94%)
1973	23 (34%)	45 (66%)
Totals	69 (31%)	152 (69%)

[4] The statistics in findings numbered 70, 71, 72 and 73 refer to "factory workers." These findings are taken from evidence offered by American and apparently exclude supervisory personnel and others.

First Memorandum Opinion of the District Court.

71. The percentage of black factory workers at the Virginia Branch from 1962 to February 28, 1974, is as follows:

Date	Blacks	Total	Percent Black
1962	201	1,476	14%
1963	193	1,441	13%
1964	188	1,397	13%
1965	169	1,321	13%
1966	160	1,263	13%
1967	191	1,218	16%
1968	175	1,151	15%
1969	173	1,099	16%
1970	161	1,046	15%
1971	157	995	16%
1972	145	923	16%
1973	149	864	17%
1974 (2/28)	169	829	20%

72. Of the persons hired into the Richmond Branch from 1964 to 1973, 133 were black and 33 were white. A breakdown by year of these is as follows:

	White		Black	
1964	5	(38%)	8	(62%)
1965 and 1966	no hiring			
1967	1	(14%)	6	(86%)
1968	11	(31%)	24	(69%)
1969	0	(0%)	6	(100%)
1970	7	(37%)	12	(63%)
1971	2	(13%)	13	(87%)
1972	6	(16%)	32	(84%)
1973	1	(03%)	32	(97%)
Totals	33	(20%)	133	(80%)

First Memorandum Opinion of the District Court.

73. The percentage of black factory workers at the Richmond Branch in 1962, 1964, 1966, 1968, 1970, 1972 and 1973 was:

Date	Blacks	Total	Percent Black
1962	93	227	41%
1964	93	228	41%
1966	78	190	41%
1968	89	189	47%
1970	80	164	49%
1972	79	151	52%
1973	90	156	58%

74. In 1973, approximately 47% (27 persons) of the total applications for jobs were filed [*sic*] by blacks and 40% (6 persons) of the total number of hires were black in the Richmond Office. The race of four applicants is unknown.

75. In the Richmond Office, from 1961 to 1974, 17% (22 persons) of all persons hired were black; from 1965 to 1974, 18% (17 persons) of all persons hired were black; and, from 1970 to 1974, 42% (10 persons) of all persons hired were black.

In 1961 there were no black employees in the Richmond Office. In 1974, 24% (13 persons) of the non-supervisory employees were black.

76. There are approximately two hundred non-craft hourly paid job classifications at the Virginia Branch. As of 1973 there were eighteen which had never been held by a white employee, and ten which had never been held by a black employee.

77. There are approximately 43 non-craft hourly paid job classifications at the Richmond Branch. As of 1973 there were twenty-one which had never been held by a white employee; and nine which had never been held by a black employee.

78. The positions of office manager, assistant office manager, and supervisor in the Richmond Office have never been held by a black employee.

79. Since 1966, there have been four vacancies in the position of supervisor in the Richmond Office. One supervisory vacancy in 1966 was filled by a white male employee who had less seniority than several white females in the Richmond Office. Two supervisory positions were filled on August 1, 1973, by white male employees transferred from the Charleston Branch which was being phased out. One of these two employees had been the office manager at the Charleston Branch, while the other had been an office supervisor in that office. As of April 12, 1974, there was one unfilled supervisory position in the Richmond Office.

C. *Facts Relevant To The Issues Of Sex Discrimination:*

80. Prior to September 16, 1963, American discriminated on the basis of sex with respect to wage structure, departments, seniority lines and hiring.

81. The same finding, except with regard to sex instead of race, is made as in finding 33.

82. As of January 15, 1963, of the approximately 1,653 employees at the Virginia Branch of the defendant company there were approximately 100 supervisors of which none was female.

83. As of May 16, 1969, of the 71 employees in supervisory positions at the Virginia Branch of American none was female.

84. As of April 16, 1973, 453 or 42.3% of the employees at the Virginia Branch were female. As of April 16, 1973, of the 69 employees in supervisory positions, 3 or 4.34% were female.

85. As of April 17, 1967, 107 or 43.5% of the employees at the Richmond Branch were female.

86. As of February 1, 1971, none of the 30 supervisors at the Richmond Branch were female, with the exception of the office supervisor.

87. As of April 16, 1973, 32% of the employees at the Richmond Branch were female.

88. As of June 1, 1973, [of] 31 employees in supervisory positions at the Richmond Branch, 2 or 6.4% were female.

89. In 1972, 18.3% (26 persons) of the total applications for jobs were filed by females and none was hired at the Virginia Branch. In 1973, 39% (274 persons) of the total applications for jobs were filed by females and 19% (12 persons) of the total hires were female.

90. The percentage of female factory workers at the Virginia Branch from 1962 to February 28, 1974, is as follows:

Date	Females	Total	Percent Female
1962	687	1,476	47%
1963	675	1,441	47%
1964	663	1,397	47%
1965	629	1,321	48%
1966	607	1,263	48%
1967	578	1,218	47%
1968	531	1,151	46%
1969	505	1,099	46%
1970	478	1,046	46%
1971	453	995	46%
1972	418	923	45%
1973	385	864	45%
1974 (2/28)	359	829	43%

91. In 1972, 12% (39 persons) of the total applications for jobs were filed by females and none was hired at the Richmond Branch. In 1973, 30% (146 persons) of the total applications for jobs were filed by females and 30% (10 persons) of the total hires were female.

92. The percent of female factory workers at the Richmond Branch in 1962, 1964, 1966, 1968, 1970, 1972 and 1973 was:

Date	Females	Total	Percent Female
1962	109	227	48%
1964	109	228	48%
1966	89	190	47%
1968	89	189	47%
1970	66	164	40%
1972	54	151	36%
1973	56	156	36%

93. During the period 1961 to 1974, approximately 93% of all persons hired at the Richmond Office were female and in 1974, 89% (49 persons) were female. In 1961, 75% (44 persons) of the non-supervisory employees were female and in 1974, 89% (49 persons) were female.

94. There are approximately two hundred non-craft hourly paid job classifications at the Virginia Branch. As of 1973, there were thirty-three such positions which had never been held by a female employee, and six which had never been held by a male employee.

95. There are approximately 43 non-craft hourly paid job classifications at the Richmond Branch. As of 1973, there were thirty-two such positions which had never been held by a female employee, and six which had never been held by a male employee.

96. Until at least September 16, 1963, American considered the following Virginia Branch job classifications to be "male" classifications:

Adjuster—Overhaul—Making and Packing
Adjuster—Controller
Adjuster—Making—From Filter Operator (for 7 Machines)
Adjuster—Making and Packing—70 mm or 85 mm (13-14-15 machines)
Operator—Turbine
Adjuster—Making and Packing—70 mm or 85 mm (up to and including 12 Machines)
Operator—Boiler
Painter—Spray
Operator—Air Conditioning
Painters—Brush
Cigarette—Drum Maintenance
Operator—Making—Filter Tip—1250 Cpm.
Operator—Making (Combination Unit)—All Lengths—1500 Cpm.
Operator—Packing (with Combination Unit or Pneumatic System) All Lengths—with Automatic Package Handling—150 ppm.
Operdtor [*sic*] and Relief—Making—85 mm Filter (1050 cpm)
Operator—Making (Combination Unit)—70 mm (1250 cpm.) and 85 mm (1125 cpm.)
Operator—Packing Machine (Combination Unit)—70 mm (125.5 ppm.) and 85 mm (112.5 ppm.)
Tractor Trailer Drivers
Operator and Relief—Box Machines—2 Machines (over 15 packers)
Adjuster—Learner (Making and Packing—70 mm and 85 mm)
Cutting Stamps

Operator and Relief—Box Machines—2 Machines (thru 15 Packers)
Operator—Container Packer (25 or more Machines)
Operator and Relief—Making and Packing—70 mm (1125 cpm.) (112.5 ppm.) and 85 mm (930 cpm.) (105 ppm.)
Operator—Dryer (Textile or Adt)
Operator—Container Packer (from 17 through 25 Machines)
Truck Driver
Crew Leader—Shipping
Operator—Hot Sealing Machine (Export)
Strapping and/or Sealing Containers (Export)
Cooking Dip and Invert
Past Cook
Packers and Checkers—Shipping
Operator—Industrial Trucks
Chauffeurs—Light Delivery
Operator and Relief—Box Machines—1 Machine (over 8 Packers)
Operator Assistant—Dryer (Textile and Adt)
Operator—Overshot Cylinder and Overshot Cylinder and Mixing
Operator—Wringing Machine
Sealing Containers
Stock Handlers—Shipping
Truck Helpers
Oiler
Operator—Container Packer (up thru 16 Machines)
Watchman
Operator and Relief—Box Machines—1 Machine (thru 8 Packers)
Operator—Scrubbing Machine
Coal Handlers
Bulker—Strip Tobacco

Factory Supply and Floorman
Hopper Fillers
Lay Out Supplies
Making Flavoring Helper
Operator—Tag Meter
Weighers and Handlers (Turkish)
Cooking Dip and Invert Helper
Bulker—Cut Tobacco
Bulker—Trucking Leaf
Feeders—Strip Stems or Shorts
General Helper
Operator—Palletizing Truck
Silver Machine Man
Sweco and Air Table Man
Machine Cleaners
Baking Scrap Paper
Cleaners (Male)
Cleaners—Air Conditioning System
Dressing Cut Tobacco
Feeder—Casing Department
Floor Labor
Material Supply Distribution
Operator—Elevator
Receiving and/or Handling Supplies

97. Until at least September 16, 1963, American considered the following Virginia job classifications to be "female" classifications:

Closing and Sealing Containers (Female)—Export
Forming and Inserting Bags in Containers—Export
Packing Containers—Export
Relief—Export
Examiners—Automatic
Catcher—Filter Tip—1250 cpm.

Catchers and Relief (Combination Unit—All Lengths—1500 cpm.)
Cigarette Paper Records
Cigarette Weighing—Individual
Examiners—Manual
Sieve Testing
Catchers and Relief—70 mm (up to 1125 cpm.)
Catchers and Relief—70 mm (1250 cpm.) and 85 mm (1125 cpm.) Combination Units
Packing in Cartons—Combination Unit
Packing Containers by Hand—85 mm (Female)—More than 6 Packing Machines
Stencil Cutters
Catchers and Relief—70 mm (up to 1025 cpm.) 85 mm (up to 930 cpm.)
Packing Containers by Hand—85 mm (Female)—6 Packing Machines or less
Packing into Cartons and Relief
Carton Searchers
Rehandler
Packing Container by Hand—70 mm (Female)
Feeders—Cutting Machine (Female)
Cleaners (Female)
Feeders—(Female)
Pickers and Searchers (Female)

98. For the years 1965 through 1972, female hourly paid production workers at the Virginia Branch had a lower mean income than males with comparable seniority.

99. For the years 1967 through 1972, female hourly paid production workers at the Richmond Branch had a lower mean income than males with comparable seniority.

100. In 1972, American selected from the ranks of its hourly production workers its first female supervisor at the

Virginia Branch, to fill the position of assistant foreman. At that time approximately 43% (490) of the total Virginia Branch work force was female.

101. As of June 1, 1973, there were three female assistant foreman at the Virginia Branch out of a total supervisory staff of 73. Thus, of the supervisors at the Virginia Branch 4 percent were female.

102. In 1967, American selected from the ranks of the hourly production workers its first female supervisor at the Richmond Branch to fill the position of assistant foreman. At the time approximately 31% (107) of the total Richmond work force was female.

103. As of June 1, 1973, there were thirty-one supervisors at the Richmond Branch of whom two (6%) were females.

104. No female has ever held a craft position at the Virginia Branch.

105. No female has ever held a craft position at the Richmond Branch.

106. The positions of office manager, assistant office manager, and supervisor in the Richmond Office have never been held by a female employee.

107. Since 1966, there have been four vacancies in the position of supervisor in the Richmond Office. One supervisory vacancy in 1966 was filled by a white male employee who had less seniority than several white females in the Richmond Office. Two supervisory positions were filled on August 1, 1973, by white male employees transferred from the Charleston Branch which was being phased out. One of these two employees had been the office manager at the Charleston Branch, while the other had been an office supervisor at that office. As of April 12, 1974, there was one unfilled supervisory position in the Richmond Office.

* * *

Second Memorandum Opinion of the District Court.

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 101-73-R

John Patterson, et al.,

Plaintiffs,

v.

The American Tobacco Co., et al.,

Defendants.

Civil Action No. 104-73-R

Equal Employment Opportunity Commission,

Plaintiff,

v.

American Brands, Inc., et al.,

Defendants.

Memorandum Opinion.

[Entered December 31, 1974]

The Court has considered the defendants' Motion to Amend and Supplement Findings of Fact and Conclusions of Law and Motion to Proffer Additional Evidence, the plaintiffs' Motion to Alter Judgment and the proposed decrees and objections thereto submitted by the parties.

Statute of Limitations

The plaintiffs' Motion to Alter Judgment is addressed to the applicable limitation for the back pay award. The

Court adheres to its original conclusion that under 42 U.S.C. § 1981 the limitation is five years prior to March 2, 1973, which would be March 2, 1968, if the claims here asserted were limited to 42 U.S.C. § 1981. They are not so limited, however, since Title VII claims are asserted, as a result of which the back pay awards may go back as far as two years prior to the filing of charges with the EEOC, i.e., until January or February, 1967, for race discrimination and until April, 1967, for the sex discrimination.

The Court further concludes that the five year limitation is not tolled during the pendency of the charges before the EEOC. There is respectable authority to the contrary;[1] however, the two claims are separate and independent and there seems to be no persuasive reason to treat the instant claim differently from other separate and independent ones, a treatment which does not, traditionally, toll the limitation of one claim while another is being administratively pursued. *Johnson* v. *Railway Express Agency, Inc.*, 489 F.2d 525, 531 (6th Cir. 1973), *cert. granted* 417 U.S. 929 (1974) (No. 73-1543; argued Dec. 11, 1974). While there may be policy reasons for such tolling, in the Court's view those should be left to the wisdom of the legislative branch of government.

American's Motion to Amend and Supplement and to Proffer Additional Evidence

The Court has examined the detailed amendments and supplements requested, and while it hesitates to treat the

[1] *Pettway* v. *American Cast Irion Pipe Co.*, 494 F. 2d 211, 258 (5th Cir., 1974); *Boudreaux* v. *Marine Contracting Co.*, 437 F. 2d 1011, 1017 n. 16 (5th Cir., 1971).

motions, obviously prepared with sincerity and industriousness, in a summary manner, the requests are in actuality a reargument of the merits of the actions. No finding of substance is requested that has not been requested before. No piece of evidence now cited in support of the request has not been considered previously. The changes requested as to form are unnecessary in the Court's opinion, and the requested supplemental findings are adequately covered in existing ones. The Motion to Amend and Supplement is accordingly denied.

The Motion to Proffer Additional Evidence must also be denied. The case was thoroughly and skillfully presented on July 15, 1974, *et seq.*, by all parties. If additional evidence is presented now by the defendants, other parties will legitimately be entitled to offer additional evidence. It is time these actions, now nearly two years old, came to a conclusion, at least at the trial level. Even after this Memorandum and the entry of the attached decree, there is yet the question of damages. The request for oral argument at this stage, however, is also denied.

The Decree

The Court has this day entered a Decree in the actions. As the parties will recognize, it is substantially the decree as proposed by the plaintiffs. Minor changes, among others, include alterations in some time limits, a less frequent reporting requirement, and additions to reflect the Court's ruling on the applicable limitation with respect to back pay. In addition a change of some substance has been made in the manner of selecting new jobs by members of the two classes. The viewing of jobs by the class member has been postponed until after he knows for which jobs he can qualify. The provision for a sixteen hour tryout on the jobs selected has been eliminated, because the Court feels

this to be wasteful and unnecessary so long as the class member has an opportunity to make an informed choice as to the job he wants. This opportunity is amply afforded by the job descriptions, the tour and the view.

The Court has some reservations about the accuracy with which the Company can determine the three jobs for which a class member, particularly one with low seniority, is eligible. Presumably plaintiffs have considered this practical problem in making their proposal, and if it can be accomplished the Court feels that this is the desirable way to proceed.

The Decree has been entered after giving due consideration to American's contention that its terms will create disruption in the efficient running of American's business. Undoubtedly some disruption is unavoidable. The Court doubts that it will be to the extent voiced by the Company and hopes that it will not be. If, however, carrying out the terms of the Decree results in an inefficient operation for two or three days, or even as much as ten days, the past inequities clearly warrant this temporary loss to eliminate the present effects of those inequities.

The Court would like a prompt hearing to determine the method of calculation and distribution of the back pay award and adjustment to the pension and profit-sharing plans, and to what extent, if any, additional evidence will be necessary to effectuate these determinations. The afternoons of January 10, 17, 24 and 31, 1975, in Alexandria, are available for the Court. If it is inconvenient to counsel to come to Alexandria, arrangements can be made for such a hearing in Richmond.

/s/

United States District Judge

Alexandria, Virginia
December 31st, 1974

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 101-73-R

John Patterson, et al.,
Plaintiffs,

v.

The American Tobacco Co., et al.,
Defendants.

Civil Action No. 104-73-R

Equal Employment Opportunity Commission,
Plaintiff,

v.

American Brands, Inc., et al.,
Defendants.

DECREE

These cases, *John Patterson, et al.* v. *The American Tobacco Co.*,[1] *Tobacco Workers International Union and Local 182, Tobacco Workers International Union* (Civil Action No. 101-73-R), and *Equal Employment Opportunity Commission* v. *American Brands, Inc. and Local 182, To-*

[1] All references herein to "American" are to the facilities of The American Tobacco Company, a division of American Brands, Inc., known as the Virginia Branch, the Richmond Branch, and the Richmond Office.

bacco Workers International Union (Civil Action No. 104-73-R), which were consolidated for trial, came on before the Court, sitting without a jury, in July, 1974, limited to the issues of liability for back pay and injunctive relief and those issues having been heard and duly tried, and a Memorandum Opinion[2] and Findings of Fact having been filed by the Court on September 25, 1974, it is now ADJUDGED, ORDERED and DECREED:

The defendants, The American Tobacco Company ("American" or "the Company"), the Tobacco Workers International Union ("International Union"),[3] and Local 182, Tobacco Workers International Union ("Local 182" or "TWIU"), their officers, agents, employees and servants and all persons in active concert or participating with them shall be and are hereby permanently enjoined and restrained from discriminating against the affected classes of black and female employees of the Company as herein described because of their race or sex in violation of Title VII of The Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and The Civil Rights Act of 1866, 42 U.S.C. § 1981, at the Company's Richmond Branch, Virginia Branch and Richmond Office located in Richmond, Virginia.

---

[2] Pursuant to the Court's request, counsel for all parties have conferred and have submitted individual proposed decrees, which have been examined by the Court. Because, in some instances the Court has adopted the proposed language of one or more of the parties, portions of this Decree may vary from the provisions of the Memorandum Opinion; whenever such variations occur, it is the Court's intent that this Decree should be controlling.

[3] The Tobacco Workers International Union ("the International") is not a defendant in the EEOC action (Civil Action No. 104-73-R). In addition to the allegations of racial discrimination raised in *Patterson* (Civil Action No. 101-73-R) the EEOC action contains allegations of sex discrimination. None of the provisions of this decree pertaining to sex discrimination is applicable to the International.

I. *The Class and the Affected Class*

1. The class of blacks (Class I) for the purposes of this Decree shall consist of:

> All black persons, whether currently employed or not, who were employees of the defendant Company on or after July 2, 1965.

2. The affected class of females (Class II) for the purposes of this Decree shall consist of:

> All females, whether currently employed or not, who were employees of the defendant Company on or after July 2, 1965.

II. *The Seniority System*

1. The defendants are enjoined from implementing, maintaining or giving effect to any seniority system, whether pursuant to any collective bargaining agreement or otherwise, which is designed to discriminate or has the effect of discriminating against members of Class I or Class II.

2. The Company shall compile within thirty (30) days from the entry of this Decree:

A. A list of all current employees in order of Company seniority in the TWIU bargaining unit at the Richmond and Virginia Branches indicating race, sex, Company seniority date, branch, job classification and employee identification number.

B. A list of all current black employees as of the date of this Decree, who have worked for the Company at any time since July 2, 1965, in order of Company seniority indicating Company seniority date, sex, branch, current job classification and employee identification number.

C. A list of all black employees who have worked for the Company at any time since July 2, 1965, who are no longer working for the Company for any reason, indicating the employee's name, sex, branch, Company seniority date, date of termination, reason for termination and employee identification number.

D. A list of all current female employees as of the date of this Decree, who have worked for the Company at any time since July 2, 1965, in order of Company seniority indicating Company seniority date, branch, race, current job classification and employee identification number.

E. A list of all female employees who have worked for the Company at any time since July 2, 1965, who are no longer working for the Company for any reason indicating the employee's name, race, Company seniority date, branch, date of termination, reason for termination and employee identification number.

F. A list of all job classifications by branch in the TWIU bargaining unit (excluding adjuster and overhaul adjuster) by order of wage rate, indicating the number of positions in each classification and the name, Company seniority date, race, sex and employee identification number of each incumbent employee.

3. Within thirty (30) days from the entry of this Decree, the above lists shall be filed with the Court and served on counsel for plaintiffs and the unions. In addition, the list in Section II, 2, A, shall be posted in the normal posting locations at each Branch and shall remain posted until the provisions of Section II of this Decree are concluded.

4. The Company shall implement for TWIU bargaining unit jobs at the Richmond and Virginia Branches the procedure set forth in Paragraphs 5 through 11 below. For the purposes of this procedure, no job qualifications

shall be required except the requisite seniority and a willingness to learn the job; provided, however, that for the jobs of adjuster and overhaul adjuster the qualifications listed in Finding of Fact No. 31 shall remain in effect.

5. American shall prepare job descriptions for all TWIU bargaining unit jobs within thirty (30) days after the entry of this Decree, which descriptions (a) are for informational purposes only, (b) are not intended to indicate all of the duties to be performed, and (c) will be used for no purpose other than to inform employees of the general nature of such jobs. Unless plaintiffs object to the job description and provide suggested modifications within fifteen (15) days after receiving a copy of them, such descriptions will be deemed to comply with this Decree. A copy of such job description shall be posted on bulletin boards located in conspicuous places at the Richmond and Virginia Branches and a copy shall be furnished to any employee who requests the same.

6. Within fifteen (15) days after copies of job descriptions are posted, all currently employed blacks and females in the TWIU bargaining unit shall be given an opportunity to tour both the Richmond Branch and the Virginia Branch. No such person need be given an opportunity to tour any department to which he has been assigned for thirty (30) days or longer.

A. Within ten (10) days after the expiration of the period prescribed in the preceeding paragraph, all currently employed members of Class I and Class II shall be given the opportunity to select not more than five jobs in order of preference.

B. Within ten (10) days after the expiration of the period described in Section II, 6, A, the Company shall determine the top three jobs on each class member's pref-

erence list that the Company reasonably anticipates such class member's seniority would permit him[4] to hold. Should the Company conclude that a Class I or Class II member's seniority would not permit him to ascend to at least three of the jobs on such preference list, that class member shall be given the opportunity to list additional jobs, totaling five when combined with the number of jobs the Company already has anticipated he would hold. The Company again shall determine if such class member's seniority would permit him to ascend to any of the jobs newly selected. This process shall be repeated until there are at least three jobs on such class member's list that the Company reasonably anticipates would be available to him. If it is determined that a class member's seniority would not permit him to ascend to any job of his selection, that class member shall remain in his original job.

Seniority as used herein is the length of Company service from the most recent date of Company employment.

C. Within thirty (30) days after the expiration of the period prescribed in Section II, 6, B, all currently employed members of Class I and Class II shall be given the opportunity to view the three jobs selected pursuant to that paragraph in operation for a period of not more than one hour each.

7. A. Within five (5) days from the completion of the procedure set forth in Section II, 6 above, each currently employed black and female shall be canvassed personally in the order of decreasing seniority at which time such person shall be given the final opportunity to select the job to which his seniority would entitle him. Any employee who would be displaced from his present job as the

[4] All references to either gender shall be construed as applying to both genders throughout this Decree.

result of the "bumping" rights afforded blacks and females under the provisions of this paragraph shall be entitled during the canvass process to select another job to which his seniority would entitle him, and each employee successively displaced shall be entitled to the same right.

B. Upon completion of the canvass, American shall commence implementation of the "bumping" process in order of decreasing seniority.

8. Should such employee entitled to the "bumping" rights as set forth in Section II, 7, elect not to exercise such rights, such election shall be made in writing on the form attached hereto as Exhibit A.

9. Any employee who should elect to exercise the "bumping" rights as set forth in Section II, 7, may elect to be removed from his selected job within fourteen (14) working days after being assigned to said job. Once an employee returns to his original classification as aforesaid, or remains in his selected job more than fourteen (14) days, all of his "bumping" rights shall be ended. Any vacancy which occurs as the result of the return by an employee to his original job within fourteen (14) working days shall be filled in accordance with the terms and conditions of the collective bargaining agreement between the defendants now in effect.

10. The Company may remove an individual from a position should that individual fail to demonstrate that he is capable of performing the duties of his selected job; provided, however, that in no case may the Company utilize standards more stringent than standards presently utilized.

11. Displaced employees: In the event that any incumbent employee is displaced as a result of the "bumping" relief provided for herein and has had to move to a

job having a lower rate, such employee shall have his or her wages "red-circled" (a) until the wage level for the job to which the employee has been moved reaches the level at which he was formerly being paid, or (b) until the employee voluntarily moves to a job with a rate lower than the job to which he was displaced, or (c) until the employee moves to a job with a rate equal to or higher than the red-circled rate, or (d) until such time as the employee fails to avail himself of the opportunity to move to a job with a rate higher than the job to which he was displaced; provided, however, that under sub-paragraph 11(d), no displaced employee shall be required to move more than once in each six-month period to a job with an hourly rate higher than the job to which he was displaced, nor shall he be required to move to a job with an hourly rate which is less than five (5) cents per hour above the rate of the job to which he was displaced or which he is occupying at the time.

12. During the canvass provided for in Section II, black employees and white female employees at the Richmond Branch or the Virginia Branch who qualify for "bumping" rights under the provisions of Section II, 7, and who desire to transfer to the other Branch, shall have the right to do so on the basis of their seniority.

II-A. *Company-wide Seniority and Transfer Rights of Currently Employed Class I and Class II Members*

After the completion of the procedure outlined in Section II, 5, or, until all Class I and Class II members who indicate their desire to transfer to another Branch have had an opportunity to do so, in accordance with the procedures outlined herein, the following Company-wide seniority and transfer rights shall be in effect:

1. A Class I or Class II member must indicate such desire on the form attached hereto as Exhibit B within thirty (30) days after the completion of the procedure outlined in Section II, 7.

2. A vacancy shall be as defined in the current collective bargaining agreement between the Company and the Union defendants.

3. Notice of a vacancy shall be posted in conspicuous places at both Branches. All members of Class I and Class II who have indicated their desire to transfer shall be given the opportunity to bid on the job posted.

4. Should such Class I or Class II member be the most senior bidder in terms of Company-wide seniority, he shall be entitled to fill the vacancy.

5. Should such Class I or Class II member transfer, he will carry with him his Company-wide seniority which will be used for all purposes, including promotion or demotion.

6. Should such Class I or Class II member twice refuse an opportunity to transfer to a vacancy for which he is the senior bidder, he thereupon will lose his right to transfer from one Branch to the other.

III. *Supervisory Personnel*

The Company is enjoined from implementing, maintaining or giving effect to any criteria utilized for the selection of supervisory personnel which is designed to or has the effect of discriminating against black or female candidates for supervisory positions.

The Company is ordered to formulate objective criteria for the promotion or selection of supervisory personnel. Job descriptions and selection criteria for supervisory

positions shall be formulated in accordance with the procedure set forth in Section II, 5 herein.

Vacancies in assistant foreman and foreman positions at the Richmond Branch and Virginia Branch and vacancies in the Office Supervisor positions at the Richmond Office shall be filled with blacks and females, except when the Company is unable to hire a qualified black or female, until, (1) the percentage of blacks in supervisory positions approximately equals the percentage of blacks in the Richmond, Virginia, SMSA work force, and (2) the percentage of females in supervisory positions approximately equals the percentage of females in the Richmond, Virginia, SMSA work force. The Company is not required to fill any such position with any person not qualified for it nor is it required to retain any person in any such position if, after a reasonable time, he is unable to perform competently the duties of such position. The decision as aforesaid is that of the Company and will not be disturbed absent a showing of race or sex discrimination.

IV. *Crafts*

For the reasons stated in the Memorandum Opinion, relief with respect to the hiring, training, or promotion of employees for craft positions at the Richmond and Virginia Branches is denied.

V. *Testing*

The screening tests used by the Company in the selection of employees to fill the position of "electronics adjustor" have had no discriminatory effect on blacks or females.

VI. *Hiring*

For the reasons stated in the Memorandum Opinion, relief with respect to the hiring of hourly paid production workers is denied.

VII. *Back Pay*

1. Hourly-paid[5] blacks who were employees of the defendant Company on or after July 2, 1965, whether currently employed or not, and (2) hourly-paid[5] females whether currently employed or not who were employees of the Company on or after July 2, 1965; shall be entitled to recover back pay from the defendants in an amount to be fixed by subsequent order of this Court and for the period beginning in January, 1967, for Class I employees and April, 1967, for Class II employees.

VIII. *Pension and Profit-Sharing Plans*

(1) Hourly-paid blacks who were employees of the defendant Company on or after July 2, 1965, whether currently employed or not; and (2) hourly-paid females who were employees of the Company on or after July 2, 1965, whether currently employed or not; [sic] shall be entitled to recover from the defendants compensation and adjustments to the pension and profit-sharing plans to recoup benefits lost as a result of the effects of past discrimination, in an amount to be fixed by subsequent order of this Court and for the same period as provided for back pay above.

IX. *Collective Bargaining Agreements*

The collective bargaining agreement now in effect and all subsequent collective bargaining agreements shall remain in, and continue to have, full force and effect, except insofar as such agreements are inconsistent with the provisions of this Decree. Should a conflict arise between the provisions of the collective bargaining agreement and the

---

[5] Craft employees in jobs which are not covered by the collective bargaining agreement between American and Local 182 are excluded from this definition.

provisions of this Decree, the terms of this Decree shall prevail.

X. *Notice*

The defendants shall give notice of this Decree to all Company employees and Union members affected thereby, by posting for a period of sixty (60) days copies of this Decree on bulletin boards, located in conspicuous places at its Richmond and Virginia Branches, the Richmond Office, and the Union facilities.

XI. *Cost and Attorneys' Fees*

Plaintiffs are awarded their costs and expenses to be taxed against the defendants. Plaintiffs in *Patterson* are entitled to recover reasonable attorneys' fees and expenses as a part of their costs of this action.

XII. *Reporting Procedure*

1. The defendants shall make bi-annual reports to this Court, the first report being due on March 15, 1975, with copies sent to counsel for plaintiffs, which shall contain:

A. Supervisory positions: (1) a listing of all supervisory vacancies, by title, department, and facility, which have occurred since the last report; (2) the name, race, sex, Company seniority date (or date of hire) of the employee selected for the position; (3) current rosters showing the name, race, sex, job title, and department for the supervisory personnel at each facility; (4) the name, race, sex, job title, department, and facility of each black or female supervisory employee terminated or demoted during the reporting period, and the reason for the termination or demotion (e.g., dismissal, retirement, etc.).

B. T.W.I.U. bargaining unit positions: (1) a listing of all job vacancies, by job title, department, and facility

which have occurred since the last report; (2) the name, race, sex, Company seniority date, job classification, department, and facility of each employee who bid on the vacant job; (3) the name, employee identification number, race, sex, Company seniority date, job classification, department, and facility of the employee awarded the job; (4) the name, race, sex, Company seniority date, job classification, department, and facility of every black or female employee who was demoted, laid off, or terminated during the last reporting period and the reason for the action.

C. Such reports shall be submitted until March 15, 1976; a similar report shall be submitted on March 15, 1977, after which time the Court shall divest itself of jurisdiction over this matter unless, prior to that date, on application of any party, jurisdiction is extended.

2. No later than thirty (30) days after the selection of the jobs in the Richmond and Virginia Branches required by Section II, *supra*, the defendants shall submit to this Court, with copies to counsel for plaintiffs, the following:

A. The name, race, sex, employee identification number, Company seniority date, wage rate, prior and current job classification, department, and facility of each employee who is displaced as a result of the procedure set forth in Section II, *supra*.

B. The name, employee identification number, race, sex, Company seniority date, job classification, and facility of each member of Class I and Class II who has (1) elected not to bid on any position; (2) bid and moved to another position (or positions), including the title of the new position(s); (3) bid on a position which he was not awarded because of insufficient seniority; or (4) executed a copy of the form attached hereto as Exhibit B. [See attached sheet.]

Second Memorandum Opinion of the District Court.

C. All personnel records, union membership lists, bid sheets, seniority rosters, and other data used in preparing the reports required by this Section, shall be maintained by the defendants at their usual places of business and shall, upon reasonable notice, be made available to counsel for plaintiffs for inspection or copying, together with any other data necessary to evaluate the performance of the defendants under this Decree. Such records shall be maintained and preserved for the duration of this Decree.

/s/

United States District Judge

Alexandria, Virginia
December 31st, 1974

Second Memorandum Opinion of the District Court.

EXHIBIT A

WAIVER OF JOB SELECTION OPPORTUNITY

I hereby acknowledge that the American Tobacco Company has given me the opportunity to select any job to which my seniority would entitle me at the Richmond and Virginia Branches in accordance with the Decree entered on .... in the cases of *John Patterson, et al.*, v. *The American Tobacco Co., et al.*, and *Equal Employment Opportunity Commission* v. *American Brands, Inc., et al.* I have elected not to exercise such opportunity and hereby waive the right of selection given by the said Decree.

.....
Employee

Witness: .....

Dated: .....

Second Memorandum Opinion of the District Court.

EXHIBIT B

REQUEST FOR OPPORTUNITY TO TRANSFER

I hereby request that I be given the opportunity to transfer from the Richmond/Virginia Branch of the American Tobacco Company to the Richmond/Virginia Branch should a vacancy occur at said Branch for which I am the most senior bidder pursuant to the Decree entered on ....., in the cases of *John Patterson, et al.* v. *The American Tobacco Company, et al.*, and *Equal Employment Opportunity Commission* v. *American Brands, Inc., et al.*

.....

Employee

Dated: .....

Company Acknowledgment: .....

Report on Job Selection Procedure.

MOTION TO SUPPLEMENT RECORD.

Nos. 75-1259, 75-1260, 75-1261, 75-1262 and 75-1263

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOHN PATTERSON, et al.,

Plaintiffs-Appellees-Appellants,

v.

THE AMERICAN TOBACCO COMPANY, et al.,

Defendants-Appellants-Appellees.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

v.

AMERICAN BRANDS, INC., etc., et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION

MOTION TO SUPPLEMENT RECORD

The American Tobacco Company and American Brands, Inc. Appellants-Defendants respectfully move the Court to

augment the record in these cases to include the Report of the Results of the Canvass Required by Paragraphs 6 and 7A of the District Court's Decree of December 31, 1974 filed this 2nd day of May, 1975 in the United States District Court for the Eastern District of Virginia, Richmond, Virginia. A copy of the Report is attached hereto as Exhibit 1.

Respectfully submitted,

THE AMERICAN TOBACCO COMPANY
AMERICAN BRANDS, INC.

By HENRY T. WICKHAM
Of Counsel

Henry T. Wickham
John F. Kay, Jr.
Kenneth V. Farino
Mays, Valentine, Davenport & Moore
F&M Center
Post Office Box 1122
Richmond, Virginia 23208

MEMORANDUM IN SUPPORT OF MOTION TO SUPPLEMENT RECORD.

Nos. 75-1259, 75-1260, 75-1261, 75-1262 and 75-1263

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOHN PATTERSON, et al.,
Plaintiffs-Appellees-Appellants,

v.

THE AMERICAN TOBACCO COMPANY, et al.,
Defendants-Appellants-Appellees.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,

v.

AMERICAN BRANDS, INC., etc., et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION

MEMORANDUM IN SUPPORT OF MOTION TO SUPPLEMENT RECORD

In support of their Motion to Supplement Record, The American Tobacco Company and American Brands, Inc.,

Report on Job Selection Procedure.

Appellants-Defendants state:

1. On February 10, 1975 this Court denied American's motion to stay those provisions of the District Court's decree of December 31, 1974 "contained in the paragraphs preceding Paragraph II 7 B".

2. American has now completed the canvass of Class I and Class II employees for the purpose of permitting such employees to select the job of his or her preference in accordance with Paragraphs 6 and 7A of the decree (App. 170-171)

3. The results of the canvass are material to a determining of the issues of liability and relief now before this Court.

4. This motion is properly made to this Court. Rule 10 (e) of the Federal Rules of Appellate Procedure; *National Nutritional Foods Ass'n.*, 491 F(2d) 1141, 1144 (2 cir., 1974); *Tillman* v. *Board of Public Instruction of Volusia Co., Fla.*, 430 F(2d) 309, 310 (5th cir. 1970); and *Munick* v. *United States*, 330 F(2d) 774, 776 (9th cir., 1964).

Respectfully submitted,

THE AMERICAN TOBACCO COMPANY
AMERICAN BRANDS, INC.

By HENRY T. WICKHAM
Of Counsel

Henry T. Wickham
John F. Kay, Jr.
Kenneth V. Farino
Mays, Valentine, Davenport & Moore
Post Office Box 1122
Richmond, Virginia 23208

Report on Job Selection Procedure.

REPORT OF THE RESULTS OF THE CANVASS ORDERED BY DECREE OF DECEMBER 31, 1974.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

JOHN PATTERSON, ET AL., Plaintiffs, v. THE AMERICAN TOBACCO COMPANY, ET AL., Defendants.	CIVIL ACTION No. 101-73-R
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiffs, v. AMERICAN BRANDS, INC., ET AL., Defendants.	CIVIL ACTION No. 104-73-R

REPORT OF THE RESULTS OF THE CANVASS ORDERED BY DECREE OF DECEMBER 31, 1974

American has just completed the canvass of Class I and Class II employees required by the Court's decree of December 31, 1974 and attaches hereto the results thereof.

Respectfully submitted,

THE AMERICAN TOBACCO COMPANY
AMERICAN BRANDS, INC.

By HENRY T. WICKHAM
Of Counsel

Henry T. Wickham
John F. Kay, Jr.
Kenneth V. Farino
Mays, Valentine, Davenport & Moore
Post Office Box 1122
Richmond, Virginia 23208

SUMMARY OF THE RESULTS OF THE CANVASS PROCEDURE ORDERED IN PARAGRAPH 7A OF DISTRICT COURT'S ORDER OF DECEMBER 31, 1975.

Number of Class I and Class II Employees Canvassed

	BM	*BF*	*WF*	*Total*
Virginia Branch	173	50	304	527
Richmond Branch	72	15	37	124
	245	65	341	651

Number of Class Members at Virginia Branch Who Requested Jobs to Which Their Plant-Wide Seniority Would Entitle Them

Employees with Pre-1965 Seniority				*Employees with Post-1965 Seniority*				
BM	*BF*	*WF*	*Subtotal*	*BM*	*BF*	*WF*	*Subtotal*	*Total*
5	2	5	12	6	0	0	6	18

Number of Class Members at Richmond Branch Who Requested Jobs to Which Their Inter-Plant Seniority Would Entitle Them

Employees with Pre-1965 Seniority				*Employees with Post-1965 Seniority*				
BM	*BF*	*WF*	*Subtotal*	*BM*	*BF*	*WF*	*Subtotal*	*Total*
2	0	6	8	13	1	0	14	22

*White Male Employees Displaced**

Pre-1965 Seniority	*Post-1965 Seniority*	*Total*
4	4	8

Class Members Displaced by Other Class Members

Pre-1965 Seniority	*Post-1965 Seniority*	*Total*
15	16	31

* One employee has already obtained the job requested by means of posting and bidding in the ordinary course of business.

As of payroll for week beginning 3-31-75

Clock No.	*Seniority Date*		*Name*	*Present Job Classification*	*Final Job Selection*	*Displaced Employee Clock No.*	*Seniority*		*Name*
481	5-17-34	MB	Branch, John M.	Opr. Mkg. 1750	#4 Adjuster Learner	1600	12-02-47	MW	Lynch, Herbert C.
834	10-02-42	FB	Williams, Mildred R.	Picker & Searcher	#44 Catcher-1750	1561	9-30-47	FW	Williams, Laura H.
898	1-18-43	MB	Jones, Isaiah T.	Opr. Mkg. 1750	#4 Adjuster Lnr.—Making	1577	10-13-47	MW	Riley, Raymond C.
903	1-25-43	MB	Patron, William E.	Packer & Checker	#69 Crew Leader	1472	10-21-46	FW	Parrish, Myrtle B.
1028	12-08-43	FB	Eaton, Alma	Picker & Searcher	#52 Filter Catcher	1632	4-13-53	FW	Boykin, Alice F.
1067	6-13-44	FW	Farmer, Lillie J.	Catcher 1500	#74 Packing Exam.	1505	1-20-47	FW	Brown, Fannie B.
1156	9-04-45	MB	Adkins, Leroy	Opr. Pkg. 150	#142 Opr. Pkg. 175	1701	10-07-48	FW	Legus, Dovie C.
1170	9-19-45	FW	Brydon, Phyllis	Catcher 1500	#73 Exam.-Making	1556	9-22-47	FW	Pulley, Lillian E.
1245	1-10-46	FW	Jones, Rosemary	Catcher 1750	#74 Exam.-Packing	1460	10-01-46	FW	Anderson, Thelma E.
1121	1-29-46	FW	Belvin, Sadie E.	Catcher 1750	#74 Exam.-Packing	(Obtained posting after canvass)			
*1361	5-23-46	FW	Harlow, Elizabeth	Hourly & Piece Worker	#16 Inspector**	1953	1-09-52	FW	Agee, Virginia L.
1421	8-14-46	MB	Williams, James E.	Opr. Mkg. 1500	#128 Opr. Mkg. 1750	1629	4-21-48	MW	Warren, Robert H.
*1599	12-01-47	FW	Jenkins, Nannie	Hourly & Piece Worker	#43 Catcher 1500	6569	11-18-74	MB	Johnson, Jr., Alphonso
*1607	12-29-47	MB	Taylor, Charles	Opr. Cutter	#141 Opr. Pkg. 150	6398	7-22-74	MB	Short, Clarence E.
*1613	1-14-48	FW	Pitts, Minnie	Hourly & Piece Worker	#90 Line Schr. 150	1946	11-08-51	FW	Shinault, Evelyn W.
*1687	9-01-48	FW	Duck, Geraldine	Hourly & Piece Worker	#43 Catcher 1500	6557	10-14-74	MB	Williams, Thomas C.
*1718	5-09-49	FW	Martin, Tiny	Hourly & Piece Worker	#90 Line Schr. 150	1940	10-24-51	FW	Johnson, Aldonia M.

* Richmond Branch employee

** Richmond Branch Job Classification

Clock No.	Seniority Date		Name	Present Job Classification	Final Job Selection	Displaced Employee Clock No.	Seniority		Name
*1962	1-17-52	FW	Bolton, Emma	Hourly & Piece Worker	#43 Catcher 1500	6558	1-14-74	MW	Beasley, Kenneth D.
2049	8-06-52	FW	Seay, Ada	Catcher 1500	#155 Opr. Schm. Boxer	2055	8-08-52	FW	Mize, Evelyn D.
*2205	7-14-53	MB	Winston, Harry	Opr. Industrial Truck	#122 Opr. Indus. Truck	5039	3-04-69	MB	Tyler, Lewis B.
*3480	11-13-67	MB	Bullock, Melvin	General Laborer	#76 Factory Supply Handler	6502	9-12-74	MB	Shelton, Eddie
*3125	4-29-68	MB	Robinson, Clyde	Opr. Knife Grinder	#168 Opr. Wringer	6440	8-09-74	MB	Williams, James
*5519	10-14-69	MB	Hardy, Herbert	Checker—Wrapping Material	#204 Watchman	6442	8-12-74	MW	Bryan, James A.
*5809	6-21-71	MB	Carter, Jr., Sidney	Sweat & Strap Hogs.	#118 Opr. Elevator	6156	4-04-73	MW	Souders, Wilbur A.
*5862	9-16-71	MB	Eberhardt, Johnnie	Opr. Pkg. Machine	#127 Opr. Mkg. 1500	6147	3-26-73	MB	Black, Melvin E.
*5922	3-27-72	MB	Hayes, Eugene	Checker—Wrapping Material	#39 Opr. Pkg.**	6200	7-09-73	MB	Johnson, James
*5978	8-08-72	MB	Cary, Emerson	Sweat & Strip Hogs.	#169 Packer & Checker	6529	9-26-74	FW	Spain, Anna M.
*6036	9-21-72	MB	Jackson, Augustus	General Laborer	#141 Opr. Pkg. 150	6393	7-22-74	FB	Shelton, Beverly
6064	10-30-72	MB	Gray, Jr., Leon	Cleaner	#191 Stock Handler	6533	9-30-74	MB	Anderson, III, Robert
*6077	11-21-72	MB	Johnson, Edward	Opr. Prefab.	#141 Opr. Pkg. 150	6364	2-28-74	MW	Henshaw, Clyde
*6154	4-04-73	MB	Moody, Carl L.	General Laborer	#141 Opr. Pkg. 150	6355	2-04-74	MB	Mitchell, William
6178	5-31-73	MB	Coleman, Romaniel	Stock Handler	#141 Opr. Pkg. 150	6347	1-24-74	FW	Rucker, Paulette
*6195	6-25-73	MB	Quarles, Genesis	General Laborer	#96 Making Flav. Helper	6354	2-04-74	MB	Forbes, Bert R.

[* Richmond Branch Employee]

[** Richmond Branch Job Classification]

Clock No.	Seniority Date		Name	Present Job Classification	Final Job Selection	Displaced Employee Clock No.	Seniority		Name
*6231	8-13-73	MB	Johnson, Welford	Opr. Prefab.	#141 Opr. Pkg. 150	6334	11-12-73	MB	Braxton, Richard
*6299	9-24-73	FB	Broadie, Nannie	Searcher & Cleaner	#43 Catcher 1500	6544	10-07-74	MB	Wingfield, Larry
*6309	10-01-73	MB	Crump, Frederick	General Laborer	#76 Factory Supply Handler	6486	9-03-74	MB	Williams, Mark
6337	11-14-73	MB	Owen, Keith	Bulk. Trucking Leaf	#88 Lay. Out Supplies	6358	2-11-74	MW	Stewart, James L.
6361	2-12-74	MB	Shelton, John	Cleaner	#76 Factory Supply Handler	6406	7-25-74	FW	Kephart, Juanita
6446	8-14-74	MB	Jefferson, Oscar	Carton Searcher	#43 Catcher 1500	6542	10-03-74	MB	Coles, Gary O.
6484	8-30-74	MB	Macon, Jr., Holiday	Cleaner	#43 Catcher 1500	6527	9-25-74	FB	Myers, Evelyn H.

Clock No.	*Seniority Date*		*Name*	*Present Job Classification*	*Final Job Selection*	*Exercising Seniority, Job Could Have Been Attained from Posting Dated*
481	5-17-34	MB	Branch, John M.	Opr. Mkg. 1750	#4 Adjuster Learner	12-4-68
834	10-02-42	FB	Williams, Mildred R.	Picker & Searcher	#44 Catcher 1750	1-10-72
898	1-18-43	MB	Jones, Isaiah T.	Opr. Mkg. 1750	#4 Adjuster Lnr.-Making	12-04-68
903	1-25-43	MB	Patron, William E.	Packer & Checker	#69 Crew Leader	10-02-70
1028	12-08-43	FB	Eaton, Alma	Picker & Searcher	#52 Filter Catcher	1-10-72
1067	6-13-44	FW	Farmer, Lillie J.	Catcher 1500	#74 Packing Examiner	10-24-74
1156	9-04-45	MB	Adkins, Leroy	Opr. Pkg. 150	#142 Opr. Pkg. 175	2-19-73
1170	9-19-45	FW	Brydon, Phyllis	Catcher 1500	#73 Exam.-Making	9-17-74
1245	1-10-46	FW	Jones, Rosemary	Catcher 1750	#74 Exam. Packing	10-24-74
1121	1-29-46	FW	Belvin, Sadie	#74 Exam.-Packing	Obtained posting after canvass	10-24-74
1421	8-14-46	MB	Williams, James E.	Opr. Mkg. 1500	#128 Opr. Mkg. 1750	2-19-73
6064	10-30-72	MB	Gray, Jr., Leon	Cleaner	#191 Stock Handler	4-25-73
6178	5-31-73	MB	Coleman, Romaniel	Stock Handler	#141 Opr. Pkg. 150	1-06-75
6337	11-14-73	MB	Owen, Keith	Bulk. Trucking Leaf	#88 Lay. Out Supplies	1-20-75
6361	2-12-74	MB	Shelton, John	Cleaner	#76 Factory Supply Handler	11-06-74
6446	8-14-74	MB	Jefferson, Oscar	Carton Searcher	#43 Catcher 1500	10-04-74
6484	8-30-74	MB	Macon, Jr., Holiday	Cleaner	#43 Catcher 1500	11-13-74
*1361	5-23-46	FW	Harlow, Elizabeth	Hourly & Piece Worker	#16 Inspector**	7-22-72
*5922	3-27-72	MB	Hayes, Eugene	Checker-Wrapping Matl.	#39 Opr.-Pkg.**	6-21-72

* Richmond Branch Employee
** Richmond Branch Job Classification

Statutes and Regulations Involved.

I. Statutory Provisions Relevant to Issue of Liability:

SECTION 703(a) OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. § 2000e-2(a) (Supp. III, 1973), *amending* 42 U.S.C. § 2000e-2(a) (1970):

"It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

SECTION 703(j) OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. § 2000e-2(j) (1970):

"Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or

employed in, any apprenticeship or other training program, in comparison with the total number of [*sic*] percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

II. Statutory Provisions Relevant to the Issue of Front Pay:

SECTION 706(g) OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, *as amended,* 42 U.S.C. § 2000e-5(g) (Supp. III, 1973):

"If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused em-

ployment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title."

III. Statutory Provisions Relevant to the Issue of Different Locations:

SECTION 703(h) OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. § 2000e-2(h) (1970):

"Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29."

Statutes and Regulations Involved.

IV. Statutory and Regulatory Provisions Relevant to the Issue of the EEOC's Failure to Follow Procedural Requisites:

SECTION 706(b) OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, *as amended*, 42 U.S.C. § 2000e-5(b) (Supp. III, 1973):

"Whenever a charge is filed by or on behalf of a person claming [*sic*] to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the 'respondent') within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe

Statutes and Regulations Involved.

that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge."

29 C.F.R. § 1601.10 (1975):

"Any member of the Commission may file a charge in writing with the Commission. If section 706(d) of title VII should be applicable, the Commission, before taking any action with respect to the charge, shall notify the appropriate State or local 706 Agency, as defined in § 1601.12(c), and offer to refer the charge to it, except for certain section 704(a) charges as provided in § 1601.12(f). The Commission will allow the State or local authority a 10-day period to request an opportunity to act under its law except when EEOC notifies the appropriate authority in writing of a different time period."

Statutes and Regulations Involved.

29 C.F.R. § 1601.11(a) (1975):

"(a) Each charge should contain the following:

"(1) The full name and address of the person making the charge.

"(2) The full name and address of the person against whom the charge is made (hereinafter referred to as the respondent).

"(3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practice.

"(4) If known, the approximate number of employees of the respondent employer or the approximate number of members of the respondent labor organization, as the case may be.

"(5) A statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a State or local authority charged with the enforcement of fair employment practice laws, and, if so, the date of such commencement and the name of the authority."

29 C.F.R. § 1601.13 (1972):

"Upon the filing of a charge or the amendment of a charge, the Commission shall furnish the respondent with a copy thereof by certified mail or in person."

29 C.F.R. § 1601.14 (1972):

"The investigation of a charge shall be made by the Commission. During the course of such investigation, the Commission may utilize the services of State and local agencies which are charged with the administration of fair employment practice laws or appropriate Federal agencies. As a part of each investigation, the charging party and the respondent shall each be offered an opportunity to submit a statement of its position or evidence with respect to the allegations."

Statutes and Regulations Involved.

29 C.F.R. § 1601.19b(a) (1972):

"(a) Within fifteen (15) days, or within such further period as the Field Director may allow, from the date of service of the Field Director's findings of fact, the parties may file such exceptions to the Field Director's findings of fact, objections, briefs and evidence in support thereof as they desire. When requested by a person not represented by counsel, assistance in the preparation of exceptions to the Field Director's findings of fact will be provided by personnel of the Field Office as deemed practicable by the Field Director."

29 C.F.R. § 1601.19c (1972):

"Following the issuance of the Field Director's findings of fact and the receipt of exceptions if any, the Field Director may invite the parties to engage in settlement discussions. Should settlement be reached, the terms thereof will be reduced to writing and shall be signed by the parties and, if approved by the Field Director, forwarded to the Commission for approval and such further action as may be appropriate. In the event no settlement is attempted or reached, the Field Director shall, upon consideration of exceptions, objections, briefs and evidence submitted under § 1601.19b, either cause the charges to be reinvestigated, issue his redetermination of fact based thereon, or forward the full investigation file to the Commission for determination as to reasonable cause."

Statutes and Regulations Involved.

29 C.F.R. § 1601.19d(a) (1972):

"(a) Following receipt of the full investigative file, the Commission shall consider and decide the issues presented and serve a copy of its decision upon the parties. If the Commission determines that the charge fails to state a valid claim for relief under title VII, or that there is not reasonable cause to believe that a charge is true, the Commission shall dismiss the charge. Where, however, the Commission determines that there is reasonable cause to believe that an unlawful employment practice has occurred or is occurring, it shall endeavor to eliminate such practice by informal methods of conference, conciliation, and persuasion."

29 C.F.R. § 1601.23 (1975):

"Should a respondent fail or refuse to confer with the Commission or its representative, or fail or refuse to make a good faith effort to resolve any dispute, the Commission may terminate its efforts to conciliate the dispute. In such event, the respondent shall be notified promptly, in writing, that such efforts have been unsuccessful and will not be resumed except upon the respondent's written request within the time specified in such notice."

Nos. 76-46 and 76-56

Supreme Court, U. S.
FILED
OCT 14 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1976

The American Tobacco Company, et al., petitioners

v.

John Patterson, et al.

Tobacco Workers' International Union, et al., petitioners

v.

John Patterson, et al.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

Robert H. Bork,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

Abner W. Sibal,
General Counsel,

Joseph T. Eddins,
Associate General Counsel,

Beatrice Rosenberg,
Assistant General Counsel,

Margaret C. Poles,
Attorney,
Equal Employment Opportunity Commission,
Washington, D.C. 20506.

INDEX

Page

Questions presented 1

Statement 2

Argument 5

Conclusion 11

CITATIONS

Cases:

Equal Employment Opportunity Commission v. *General Electric Co.*, 532 F. 2d 359 9

Equal Employment Opportunity Commission v. *Hickey-Mitchell Co.*, 507 F. 2d 944 10

Equal Employment Opportunity Commission v. *Huttig Sash & Door Co.*, 511 F. 2d 453 9

Equal Employment Opportunity Commission v. *Kimberly-Clark Corp.*, 511 F. 2d 1352 9

Equal Employment Opportunity Commission v. *Occidental Life Insurance Co.*, 535 F. 2d 533, petition for certiorari pending, No. 76-99 9

Equal Employment Opportunity Commission v. *Raymond Metal Products Co.*, 530 F. 2d 590 9

Franks v. *Bowman Transportation Co.*, No. 74-728, decided March 24, 1976 ..... 7, 8

Russell v. *American Tobacco Co.*, 528 F. 2d 357, certiorari denied, No. 75-1081, April 19, 1976 11

Sabala v. *Western Gillette Inc.*, 516 F. 2d 1251 8

Page

Statutes:

Civil Rights Act of 1964, Title VII, 78 Stat. 253, as amended, 42 U.S.C. (and Supp. V) 2000e *et seq.*:

42 U.S.C. 2000e-2(h) 2, 10

42 U.S.C. (Supp. V) 2000e-5(g) 7

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-46

THE AMERICAN TOBACCO COMPANY, ET AL., PETITIONERS

v.

JOHN PATTERSON, ET AL.

No. 76-56

TOBACCO WORKERS' INTERNATIONAL UNION, ET AL., PETITIONERS

v.

JOHN PATTERSON, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the courts below correctly found that petitioners engaged in unlawful employment practices by discriminating against individuals with respect to promotions because of their race and sex.

2. Whether the court of appeals correctly held that the individual victims of petitioners' unlawful employment practices should be awarded back pay from the time they were unlawfully denied a promotion until the time they obtain their rightful place.

3. Whether the Equal Employment Opportunity Commission may properly bring a civil action alleging discrimination against women on account of their sex when the facts concerning such discrimination were discovered by the Commission in the course of its investigation of a male employee's charge of sex discrimination.

4. Whether the courts below correctly found that employees of the company's two plants, located in the same city only a few blocks from each other, do not "work in different locations" within the meaning of the exemption contained in 42 U.S.C. 2000e-2(h).

STATEMENT

The Equal Employment Opportunity Commission brought this action in the United States District Court for the Eastern District of Virginia against the American Tobacco Company and Local 182 of the Tobacco Workers' International Union.[1] The Commission alleged, *inter alia*, that the company and the local union had engaged in unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964 by discriminating against individuals with respect to promotions because

[1]The Commission's suit was consolidated with a previously filed private class action, which had named as an additional defendant the Tobacco Workers' International Union. The International was not a party to the Commission's action, and we do not address the issue, presented by the petition in No. 76-56, whether the International was properly held liable for the Title VII violations in this case.

of their race and sex. The allegations related to promotion practices in the company's two plants and its administrative office in Richmond, Virginia.

After a trial, the district court found that, "except for the non-supervisory employees in the Richmond [Administrative] Office, there was and is disparate income by race and sex, segregated job classifications by race and sex, and promotional systems based on race and sex" (Pet. App. 44a).[2] The court also found that petitioners failed to carry their burden of rebutting the *prima facie* showing of discrimination or of demonstrating "that the discrimination is caused by business necessity" (Pet. App. 45a). The district court accordingly entered a decree (Pet. App. 89a-102a) providing a broad range of relief, including requirements that the company institute a company-wide seniority system, eliminate certain lines of progression, post definite job descriptions, grant back pay, and make appropriate adjustments in pension and profit-sharing plans. The decree also provided that blacks and women with greater company-wide seniority should be allowed to "bump" whites and men with less seniority from their existing jobs (Pet. App. 93a-96a), and that the company should fill supervisory vacancies with qualified blacks and women until their percentages in supervisory positions approximately equal their percentages in the work force (Pet. App. 97a-98a).

On appeal, the court of appeals "conclude[d] * * * that the record amply supports the district court's finding that after the effective date of Title VII the company and the union discriminated in the promotional policies

[2]"Pet. App." refers to the separately bound appendix to the petition for a writ of certiorari in No. 76-46.

of their bargaining agreements and practices" (Pet. App. 8a; see also Pet. App. 23a). In response to petitioners' challenge to the district court's relief, however, the court of appeals modified the decree in several material respects.

First, whereas the district court ordered the company to maintain only a single seniority register for its two Richmond plants so that an employee in one plant could transfer to better paying jobs in the other without loss of company seniority, the court of appeals held that only those employees who suffered unlawful discrimination as a consequence of the separate seniority lists should be allowed to transfer without loss of company seniority (Pet. App. 10a-11a; see also Pet. App. 23a). Second, the court of appeals eliminated the "bumping" provisions of the decree and substituted a requirement of "full monetary compensation" (Pet. App. 20a) to the individual victims of prior unlawful discrimination—*i.e.*, an award of back pay from the date an individual was unlawfully denied promotion to the date of judgment, to be "supplemented by an award equal to the estimated present value of lost earnings that are reasonably likely to occur between the date of judgment and the time when the employee can assume his new position" (Pet. App. 18a-19a).[3] Third, the court of appeals held that, although Title

[3]The court of appeals left to the district court the final formulation of relief designed to accomplish the objective of full "compensation for the entire time that a minority employee is denied a promotion for which he or she is qualified by seniority and ability" (Pet. App. 20a). The opinion made clear that the court's suggestion of an award of "front pay" was meant to be illustrative rather than conclusive. The court stated: "Alternatively, the [district] court may exercise continuing jurisdiction over the case and make periodic back pay awards until the workers are promoted to the jobs their seniority and qualifications merit. Or perhaps counsel and the court can devise some other convenient method of taking all the effects of past discrimination into account" (Pet. App. 19a).

VII would not preclude preferential hiring as an element of relief for unlawful discrimination in the hiring of supervisors, "the rate at which the company currently appoints blacks and women to supervisory positions is sufficient to show that there is no compelling need for the imposition of a quota" (Pet. App. 31a). The court therefore eliminated the preferential hiring provisions of the district court's decree.

ARGUMENT

1. Petitioners argue (ATC Pet. 8-12; Union Pet. 7-11)[4] that the district court's finding of unlawful post-1965 promotional discrimination—a finding that the court of appeals upheld as "amply support[ed]" by the record (Pet. App. 8a)—is in fact not supported by the record. What perpetuated the effects of the overt pre-Act discrimination (see Pet. App. 5a-6a, 23a), according to petitioners, was not their post-Act promotion practices but rather the impact of "automation and a stagnant economy" (Union Pet. 9).

This factual issue was thoroughly considered and correctly resolved by the court of appeals, which determined that the effects of the prior overt discrimination were perpetuated by a *combination* of a static economic situation *and* petitioners' promotion policies, which "allowed little advancement of black employees" from the lower paying to higher paying jobs from which they were formerly excluded on account of their race (Pet. App. 6a). Even after 1968, when the company discontinued its discriminatory "qualifications system," "access to certain jobs was barred to black employees

[4]"ATC Pet." refers to the petition in No. 76-46. "Union Pet." refers to the petition in No. 76-56.

by lines of progression and the maintenance of separate seniority rosters for each [of the two Richmond plants]" (Pet. App. 7a).

Similarly, although the company's pre-Act overt discrimination against women was "nominally eliminated in 1963," its "discriminatory effect was [thereafter] perpetuated by lack of definite job descriptions, lines of progression, and obstacles to transfers" (Pet. App. 23a).

Although the court of appeals found additional support for the finding of unlawful discrimination in statistics showing the continued manifestation of segregation by race and sex in the company's work force (Pet. App. 7a-8a, 23a), it did not purport to rest its conclusion solely upon those statistics, nor did it "construe Title VII to require an employer to eliminate statistical imbalances which might exist in its work force" (ATC Pet. 9). Rather, the court correctly found substantial evidence that the company's post-Act promotion practices had the unlawful effect of freezing blacks and women into jobs to which they had previously been assigned because of their race or sex.

2. The court of appeals modified the district court's decree by eliminating the "bumping" provisions and substituting a requirement that the victims of the unlawful employment discrimination be compensated for any loss of wages from the time they were unlawfully denied a promotion until the time they actually achieve their rightful place within the company. The court suggested, but did not mandate (see n. 3, *supra*), a form of relief that would combine an award of back pay for the period up to the date of judgment and an award (referred to by petitioners as "front pay") for the period after the date of judgment. Petitioners argue (ATC Pet. 12-15; Union Pet. 16-18) that the "front pay" element of such

relief would be improper because, under Title VII, "back pay must terminate, at the latest, on the date of judgment" (ATC Pet. 13).

There is no such remedial limitation in the statute. It provides that, on a finding of intentional discrimination, a court may issue injunctive relief and may "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay * * *, or any other equitable relief as the court deems appropriate." 42 U.S.C. (Supp. V) 2000e-5(g). The purpose of this provision was to give the courts "broad equitable discretion" " 'to fashion the most complete relief possible' " with the aim of restoring the victims of unlawful employment discrimination " 'to a position where they would have been were it not for the unlawful discrimination' " (*Franks* v. *Bowman Transportation Co.*, No. 74-728, decided March 24, 1976, slip op. 14-15). The effect of the Act's broad remedial provision is to empower "federal courts * * * to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims" of unlawful employment discrimination (*id.* at 15).

It may be an adequate make-whole remedy in many cases to advance the victims of the unlawful discrimination to their rightful place in the employment system and to award back pay to compensate them for past loss of wages. Because of the peculiar circumstances of this case--including a static economic condition that limited the number of new vacancies—prompt advancement of the blacks and women to their rightful place in the company could be achieved only by "bumping" existing employees from their positions. The court of appeals found that "bumping" relief would be unduly disruptive

in light of all the circumstances and that rightful place relief should be limited to the filling of new vacancies.

Recognizing, however, that the individual victims of the unlawful discrimination will, until they achieve their rightful place, continue to suffer the economic injury caused by the discrimination, the court correctly concluded that a proper make-whole remedy should include a form of compensation for future, as well as past, loss of wages. In the absence of such a remedy, "[a]dequate relief may well be denied" (*Franks* v. *Bowman Transportation Co., supra,* slip op. 15), because the past discrimination would continue to affect the future wages of those who were unlawfully denied promotions.

The cases relied on by petitioners do not hold that "front pay" relief is barred by the Act. In *Sabala* v. *Western Gillette, Inc.*, 516 F. 2d 1251 (C.A. 5)—the only case in which prospective monetary relief was specifically addressed—the court of appeals held only that the district court properly declined to award such relief because it was unnecessary in the particular circumstances. To say, as the Fifth Circuit did in *Sabala,* that front pay is not in every instance "required as a matter of law" (516 F. 2d at 1266) is not to suggest that front pay is prohibited as a matter of law.

3. The company argues (ATC Pet. 18-21) that EEOC should not have been permitted to bring this action insofar as its complaint alleged discrimination against women on account of their sex, because no woman employee filed such a charge with the Commission. There was, however, a charge of sex discrimination filed by a male employee, and the company's discrimination against women was discovered by the Commission in the course of its investigation of the male employee's

charge (Pet. App. 22a, 32a). The Commission's determination of reasonable cause included a finding of sex discrimination against women.[5] The Commission thereafter engaged in conciliation efforts with the company with respect to all the matters addressed by the reasonable cause determination, and it brought this suit only after notifying the company that conciliation efforts were deemed to have failed.[6]

It is now established that EEOC may include in a suit brought after failure of conciliation allegations concerning any matter uncovered during a reasonable investigation of a properly filed charge—even if the matter is outside the scope of the original charge—as long as it is addressed in the Commission's reasonable cause determination. *Equal Employment Opportunity Commission* v. *General Electric Co.*, 532 F. 2d 359 (C.A. 4); *Equal Employment Opportunity Commission* v. *Raymond Metal Products Co.*, 530 F. 2d 590 (C.A. 4); *Equal Employment Opportunity Commission* v. *Occidental Life Insurance Co.*, 535 F. 2d 533 (C.A. 9), petition for certiorari pending, No. 76-99. See *Equal Employment Opportunity Commission* v. *Huttig Sash & Door Co.*, 511 F. 2d 453 (C.A. 5); *Equal Employment Opportunity Commission* v. *Kimberly-Clark Corp.*, 511 F. 2d 1352 (C.A. 6). These courts have recognized that the Commission need not disregard discrimination that it finds in the course of a reasonable investigation but may properly seek to eliminate all discriminatory practices so uncovered. Where the uncharged forms of discrimination are addressed in the reasonable cause determination, the

---

[5]See Attachment A to the Commission's brief in the court of appeals.

[6]*Id.*, Attachment B.

employer has ample time to conciliate the issues with the Commission and to correct the discrimination found.

Equal Employment Opportunity Commission v. *Hickey-Mitchell Co.*, 507 F. 2d 944 (C.A. 8), on which petitioners rely, is not to the contrary. The court of appeals there held only that the Commission improperly failed to comply with its own regulations governing notice of a failure of conciliation. Those regulations were complied with in this case. The Commission's regulations do not preclude premising a reasonable cause determination on facts discovered in the course of an investigation of a properly filed charge.

4. Petitioners object to the court of appeals' holding that the victims of the company's prior discrimination should be allowed to transfer from one to the other of the company's two Richmond plants (ATC Pet. 16-17). The contention rests on the provision that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment * * * to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin * * * ." 42 U.S.C. 2000e-2(h).

The court of appeals correctly concluded that the "different locations" exemption is unavailable to petitioners. First, the company's two Richmond plants—"only a few city blocks apart"—"are not in different locations" (Pet. App. 12a).[7] Second, the exemption

---

[7] The court stated that the company "hires employees for both branches from the same labor market"; "[t]here are entry level jobs at both places that require neither particular skills nor experience"; "[t]he same bargaining agreement covers employees at both plants, and the company has contractually reserved the right to shift employees from one plant to the other without depriving them of seniority"; the Richmond administrative office serves both plants; and one plant ships the other's products (Pet. App. 12a-13a).

applies only when the "differences in the conditions of employment 'are not the result of an intention to discriminate' " (Pet. App. 13a). In this case, " 'where present differences in working conditions are remnants of past intentional discrimination, the proviso of §2000e-2(h) bars a company from defending its employment practices on the ground that its employees work in different locations' " (*ibid.*). See *Russell* v. *American Tobacco Co.*, 528 F. 2d 357, 363 (C.A. 4), certiorari denied, No. 75-1081, April 19, 1976.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

ABNER W. SIBAL,
General Counsel,

JOSEPH T. EDDINS,
Associate General Counsel,

BEATRICE ROSENBERG,
Assistant General Counsel,

MARGARET C. POLES,
Attorney,
Equal Employment Opportunity Commission.

OCTOBER 1976.

DOJ-1976-10

Supreme Court, U. S.
FILED
AUG 26 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-46

THE AMERICAN TOBACCO COMPANY, *et al.*,
Petitioners,

v.

JOHN PATTERSON, *et al.*

No. 76-56

TOBACCO WORKERS' INTERNATIONAL UNION, *et al.*,
Petitioners,

v.

JOHN PATTERSON, *et al.*

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR JOHN PATTERSON, ET AL., IN OPPOSITION

JACK GREENBERG
O. PETER SHERWOOD
BARRY L. GOLDSTEIN
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, New York 10019

HENRY L. MARSH, III
S.W. TUCKER
JOHN N. SCOTT, JR.
RANDALL G. JOHNSON
Hill, Tucker & Marsh
214 East Clay Street
Richmond, Virginia 23261

Counsel for John Patterson, et al.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-46

THE AMERICAN TOBACCO COMPANY, *et al.*,

Petitioners,

v.

JOHN PATTERSON, *et al.*

No. 76-56

TOBACCO WORKERS' INTERNATIONAL UNION, *et al.*,

Petitioners,

v.

JOHN PATTERSON, *et al.*

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR JOHN PATTERSON, ET AL., IN OPPOSITION

Jurisdiction

The jurisdictional requistites are adequately set forth in the petitions.

Questions Presented

The American Tobacco petition presents the following questions:

(1) Whether the finding of the district court that the defendant company and union had engaged in unlawful discrimination on the basis of race was clearly erroneous.

(2) Whether front pay is a permissible remedy in an action under Title VII of the 1964 Civil Rights Act.

(3) Whether section 703(h) of Title VII protects a company rule prohibiting transfers between two plants even if that rule has the effect of perpetuating past discrimination.

(4) Whether the E.E.O.C. could maintain this action insofar as it seeks to remedy discrimination against female employees.

The Tobacco Workers petition presents the first two questions noted above, plus an additional question:

(5) Whether the International Union could be held jointly liable with its Local 182 for the proven unlawful discrimination.

Reasons for Denying the Writ

1. This is not, as the company suggests, a case in which the finding of discrimination was based solely "on statistics," or in which the defendants were directed to "achieve racial balance."

The determination of liability in this case was grounded upon a factual finding by both courts below that the defendants maintained specific employment practices which prevented black workers, originally assigned to low paying pre-fabrication jobs because of their race, from reaching the better paying fabrication jobs which they would have held in the absence of discrimination. These obstacles to the elimination of discrimination were (a) the utilization of unwarranted lines of progression, pursuant to which many junior whites enjoyed a preference for certain promotions over more senior and experienced blacks,[1] (b) a prohibition against transfers between a plant employing 45% of all black pre-fabrication workers and another plant, a block away, where 91% of all the high paying fabrication jobs and 90% of all whites were located,[2] and (c) the lack of definite job descriptions.[3] As a result of these obstacles, on December 31, 1973, five years after the defendants claimed to have reformed their seniority system "to permit all employees to compete equally," 90.7% of pre-fabrication workers were still black and 89.5% of fabrication workers were still white.[4]

The remedy ordered by the district court and upheld by the court of appeals was narrowly directed to these particular practices which had perpetuated the effects of past discrimination. Six of the nine lines of progression were eliminated, the no transfer rule was modified, and the defendants were required to post written job descriptions.[5]

---

[1] Petition No. 76-46, pp. 8a-10a; Petition No. 76-56, Appendix A, pp. 25-26; Appendix B, pp. 57, 71-72.

[2] PX 21; Ex. App. 53, Brief for John Patterson, et al., Appellees and Cross-Appellants, p. A-8.

[3] Petition No. 76-46, pp. 6a-7a; Petition No. 76-56, Appendix A, pp. 23-25; Appendix B, pp. 58, 69.

[4] PX 51, Ex. App. 53, Brief for John Patterson, et al., Appellees and Cross Appellants, p. A-8.

[5] Petition No. 76-56, Appendix A, pp. 24-29.

This remedy removed barriers which have prevented blacks from reaching jobs which they would have held in the absence of discrimination. The defendants were not ordered to achieve any particular number of blacks or whites in any plant, department, or job.

2. Although there may in the past have been some uncertainty as to the availability of "front pay", that issue was definitely resolved by this Court in *Franks* v. *Bowman Transportation Co.*, 44 U.S.L.W. 4356 (1976).

Prior to *Franks* the only appellate case in which the availability of front pay was argued by the parties and expressly decided by the court was *Sabala* v. *Western Gillette, Inc.*, 516 F.2d 1251 (5th Cir. 1975). There the district court awarded back pay only for the period before its order modifying the defendants' seniority system; on appeal plaintiffs urged back pay should accrue until the date when each class member actually reached his rightful place. The Fifth Circuit concluded that back pay after the date of the injunctive relief (i.e. "front pay") was available under Title VII, but not necessarily required.

> Although logic may suggest that those two dates [the date when back pay ended and the date when the employee reached his rightful place] should coincide, we do not think that that result is required as a matter of law. We think that a court in equity, in framing its relief, is at liberty to do what the district court has ordered here. . . . On remand, the district court, may, if necessary, reconsider the back pay relief granted in light of the company's ability to date to find jobs for the discriminatees. 516 F.2d at 1266.

Although this Court in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), expressly disapproved of such broad

discretion in determining back pay claims, the panel in *Sabala*, handed down less than six weeks later, made no mention of *Moody*. In the other Fifth and Sixth Circuit decisions relied on by petitioners, the opinions refer to back pay periods which end prior to the date when all class members would reach their rightful place, but there is no indication that the plaintiffs there sought a longer period or that the court understood its language in this regard to decide a significant legal question.[6]

In *Franks* v. *Bowman Transportation Co.*, 44 U.S.L.W. 4356 (1976), all members of the Court agreed that Title VII required that victims of discrimination be made whole and restored to the economic position they would have enjoyed in the absence of discrimination. The question on which differing views were expressed was whether this should be done by injunctive relief, which under certain circumstances could have an impact on white non-victims, or by monetary relief, which would not. The majority concluded that, where constructive seniority would be sufficient to end at once all continuing effects of past discrimination, such injunctive relief was to be preferred. 44 U.S.L.W. at 4360-66. Front pay was expressly recognized as a possible alternative, 44 U.S.L.W. at n. 38. The Chief Justice expressed a preference for monetary relief in the form of front pay. 44 U.S.L.W. at 4367. Justices Powell and Rhenquist thought the question a matter of discretion for the trial court. 44 U.S.L.W. at 4366-4371.

The instant case presented a similar choice of remedies; for the future plaintiffs could be made whole either by immediately putting each in his rightful place and "bump-

---

[6] See *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870, 876-78 (6th Cir. 1973); *Meadows* v. *Ford Motor Co.*, 510 F.2d 939, 948 (6th Cir. 1975); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 258 (5th Cir. 1974); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1379 (5th Cir. 1974).

ing" whites out of job they now hold, or permitting blacks to promote into the next vacancies which occur and compensating them for wages lost in the interim. The court of appeals preferred the latter remedy and directed modifications of the defendants' seniority and promotion system which should, in the long run, enable black employees to reach the positions they would have held in the absence of discrimination. As a practical matter, however, several years will elapse before all blacks arrive at their rightful places, and during this period those blacks will continue to earn less than whites of equal seniority solely as a result of past discrimination. The Fourth Circuit therefore properly concluded that additional monetary relief would be required to compensate blacks for such future losses. A "no front pay" rule, as urged by the defendants, would mean that Title VII *forbids* the courts from making whole employees for losses which will occur in future years. Such a prohibition would clearly frustrate the statutory purposes of Title VII. *Albemarle Paper Company* v. *Moody, supra.*

3. Section 703(h), relied on in the companies' petition[7] is of no relevance to this case. That section provides that the use of different employment conditions and rules at "different locations" is not unlawful unless "the result of an intention to discriminate."[8] The problem presented by this case is not that the practices at the Virginia and Rich-

[7] Petition in No. 76-46, pp. 3, 16-17.

[8] Section 703(h) of Title VII, 42 U.S.C. § 2000e(h), provides in pertinent part:

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment . . . to employees who work in different locations provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin . . . ."

mond branches were different, but that the same form of discrimination was practiced at both.

During the period when most of American Tobacco's employees were hired, employees were segregated on the basis of race; the only jobs open to black applicants were in the poorly paid pre-fabrication department. The two "branches", located less than 1000 feet apart, differ in that pre-fabrication jobs constitute almost a third of the jobs at the Richmond Branch, but only one twentieth of the jobs at the Virginia Branch. As a result, although the Virginia Branch had 7 times as many employees as the Richmond Branch, half of positions historically open to blacks were restricted to the smaller Richmond Branch. Because of this policy of discrimination, blacks now constitute 41.2% of the employees at the Richmond Branch, but only 14.7% of the workers at the Virginia Branch. Over 90% of the higher paid fabrication jobs, and of the white workers, are at the Virginia Branch. Thus while almost half of the blacks are still locked into the poorly paid pre-fabrication jobs work at the Richmond Branch, 656 of the 718 high-paid fabrication jobs are at the Virginia Branch.[9] The district court properly concluded, in light of these facts, that the defendants' prohibition against transfers between the Virginia and Richmond Branches perpetuated the effect of past discrimination.[10] The company sought certiorari last Term regarding this same unlawful arrangement at two plants in Reidsville, North Carolina, *American Tobacco Co.* v. *Russell,* No. 75-1081; certiorari was denied. 44 U.W.L.W. 3593 (1976).

4. Any defects in E.E.O.C.'s administrative processing of the charge of sex discrimination have as a practical mat-

[9] Plaintiffs' Exhibit 21; Ex. App. 53.

[10] Appendix A, p. 27; Appendix B, pp. 96-97.

ter been rendered moot by the trial on the merits. Where such defects occur the remedy, in an appropriate case, is to defer judicial proceedings while the administrative processing is completed in the proper manner. This may be achieved by a stay, or by dismissal without prejudice, *E.E.O.C.* v. *Hickey-Mitchell,* 507 F.2d 944, 945 (8th Cir. 1974), and is intended to afford the defendant an opportunity to avoid trial by settling the case through "conference and conciliation" or by persuading the E.E.O.C. that there was no "reasonable cause" to believe there was discrimination. See 29 C.F.R. § 1601. In the instant case, even without such a formal deferral, the defendant had over a year between the filing of this action and the commencement of trial in which to settle the case or persuade the E.E.O.C. that its complaint was groundless. It would be manifestly pointless, at this late date, some two years after the trial on the merits, to stay or dismiss without prejudice the sex discrimination claim; the E.E.O.C., having prevailed at trial, will obviously not be persuaded at this juncture that there was no discrimination on the basis of sex, and would not settle for less relief than has already been ordered by the district court.

5. The Tobacco Workers' International Union and its Local 182, in a joint petition, urge the court of appeals erred in holding that the International was jointly liable with the Local for the union violations of Title VII. They urge that the Local acted strictly on its own and was "solely responsible" for any illegality in its dealing with the employer.[11] Since the Local and International are in agreement that the Local should bear all responsibility for union liability, there is no need for judicial resolution of this question. The sole effect of a ruling on this issue would

[11] Petition in No. 76-56, pp. 11-16.

be to allocate financial liability between the Local and the International; since plaintiffs have no interest in who pays the monetary compensation, and the defendant unions are in agreement, this aspect of the union petition presents no case or controversy.

The assertion of the International that it was in no way involved in the proven discrimination is not supported by the record. Prior to 1963 the International maintained segregated locals corresponding to, and supporting, the racially segregated departments.[12] The no-transfer rule and unwarranted lines of progression were expressly required by the collective bargaining agreements.[13] Those union contracts were negotiated by the officials and staff of the International.[14] The International reserves the power to approve or reject all collective bargaining agreements, and exercises that power through the International officials at the negotiations.[15] For its role in these negotiations, and other services, the International receives 60% of the dues paid by the union members at American Tobacco.[16] The finding of fact of the two courts below, that these circumstances warranted the imposition of liability on the International, is neither clearly erroneous nor of sufficient import to warrant review by this Court.

[12] App. 48.

[13] App. 50-51.

[14] App. 435, 521, 573.

[15] App. 521-22.

[16] App. 248-49.

CONCLUSION

For the foregoing reasons the petitions for writ of certiorari should be denied.

Respectfully submitted,

JACK GREENBERG
O. PETER SHERWOOD
BARRY L. GOLDSTEIN
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, New York 10019

HENRY L. MARSH, III
S.W. TUCKER
JOHN N. SCOTT, JR.
RANDALL G. JOHNSON
Hill, Tucker & Marsh
214 East Clay Street
Richmond, Virginia 23261

Counsel for John Patterson, et al.

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of August, 1976, I served three copies each of the Brief for John Patterson, et al., In Opposition by depositing them in the United States mail, first class postage prepaid, addressed to -

Herbert L. Segal
Segal, Isenberg, Sales, Stewart & Nutt
3rd Floor
M.E. Taylor Building
Louisville, Kentucky 40202

Jay Levit
Stallard & Levit
2120 Central National Bank Building
Richmond, Va. 23219

Henry T. Wickham
John F. Kay, Inc.
F & M Center
P.O. Box 1122
Richmond, Va. 23208

Hon. Robert Bork
Solicitor General
Department of Justice
Washington, D.C.

I further certify that all parties required to be served have been served.

Eric Schnapper

see

76

-

56